S. Hrg. 100-973

PETROLEUM MARKETING PRACTICES ACT AMENDMENTS OF 1987

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ENERGY REGULATION
AND CONSERVATION

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 2179

TO AMEND THE PETROLEUM MARKETING PRACTICES ACT

OCTOBER 4, 1988

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Committee on Energy and Natural Resources

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PETROLEUM MARKETING PRACTICES ACT AMENDMENTS OF 1987

TUESDAY, OCTOBER 4, 1988

U.S. Senate,
Subcommittee on Energy Regulation
and Conservation,
Committee on Energy and Natural Resources,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SD-366, Dirksen Senate Office Building, Hon. Wendell H. Ford, presiding.

OPENING STATEMENT OF HON. WENDELL H. FORD, U.S. SENATOR FROM KENTUCKY

Senator Ford. Good morning, ladies and gentlemen.

The Petroleum Marketing Practices Act was enacted in 1978 to promote fair competition in the retail gasoline market and prevent the major oil companies from controlling the price and supply of gasoline through any unreasonable termination of a marketer's franchise agreement. It was intended to put marketers in a fair bargaining position during the renewal or renegotiation of franchise agreements.

The bill proposes three modifications to the PMPA in an attempt to fulfill the original purposes of the act. First, the bill clarifies the definition of franchise to make clear that all contracts economically necessary to the operation of the franchise will be considered part of the franchise agreement so that changes or additions to the contracts between the franchisor and the franchisee that are critical to the operation of a retail gasoline facility will also be subject to the PMPA.

Second, it requires any changes proposed at the time of renewal of a franchise agreement to be "fair and reasonable." The present law allows franchise terminations based on changes or additions to the franchise agreement so long as they are made in "good faith" and not "for the purpose of preventing the renewal of the franchise relationship."

Third, the legislation protects franchisees from being terminated in situations where the retail gasoline facility is operated pursuant to a lease negotiated between the franchisor and the owner of the property, and the franchisor allows that lease to expire.

Under S. 2179, if the franchisor intends to let the lease expire and the franchisee is able to negotiate its own lease agreement with the owner of the property, then the franchisee may continue to operate.

I look forward to the discussion this morning between the participants here. I do not think we will be too long, and if you would keep your statements within a reasonable length of time, why it will give me a chance to ask some questions. You-all might even debate it. Mr. Smith, I am delighted to see you here this morning and you may smoke, as you wish. It will be a designated smoking area this morning. [Laughter.]

Mr. Probus, you are in damn bad trouble you know when you have got a guy over there smoking cigarettes.

Mr. PROBUS. I brought my bourbon with me.

Senator FORD. Well, I am caught between a rock and a hard place. Good morning, Don. Do you have any statement you want to make?

Senator NICKLES. Good morning, Mr. Chairman. I do have a statement and would like to have it entered into the record as well.

Senator FORD. Without objection, so ordered.

[The prepared statement of Senator Nickles and the text of S. 2179 follow:]

SUBCOMMITTEE ON ENERGY REGULATION AND CONSERVATION
STATEMENT OF SENATOR DON NICKLES

October 3, 1988

Mr. Chairman, thank you for the opportunity to make a few comments. The record being established at today's hearing on S.2179 will help the Committee determine whether there are any problems in the Petroleum Marketing Practices Act of 1978 that require congressional action, and whether the pending legislation would correct those problems. Although it is too late for the 100th Congress to act on this legislation, this hearing will be helpful in determining legislative priorities for the committee next Congress.

I am very concerned that the Departments of Energy and Justice have not been invited to testify at today's hearing, because their impartial expertise is essential to a complete hearing record. In addition, I note that also missing from the witness list is the Federal Trade Commission, the agency charged with overseeing the PMPA. Accordingly, it is clear that the Committee must hold additional hearings on the Petroleum Marketing Practices Act before it contemplates changing current law.

Since oil decontrol in 1981, the petroleum marketing industry has made enormous changes to adopt to evolving customer demands. These changes have occurred in the presence of the PMPA, which provides a framework for franchisee rights and for resolution of conflicts. An important aspect of today's hearing is whether passage of S. 2179 would restrict the ability of the industry to continue to respond to market-driven change and what effect those restrictions would have on consumers.

The bill is supported by the independent service station dealers, the franchisees, and is opposed by the refiners, jobbers and chain marketers, the franchisors. The potential for inequitable treatment by franchisors makes it especially important that Congress listen carefully to the dealers' concerns.

In particular, I look forward to today's testimony on the adequacy of the PMPA to prevent overreaching by any one segment of the industry over another and whether S. 2179, if enacted, would correct that overreaching.

At the same time, however, the limited support for S. 2179 should caution us to consider carefully what we would be doing by changing the PMPA, especially if those changes will materially alter existing contracts to the advantage of one group over another. The PMPA was carefully crafted to balance the equities in the long-standing relationships in the petroleum marketing industry, and should not be changed without careful deliberation.

In addition, I look forward to hearing the witnesses' comments on whether S. 2179 may be an overly broad solution for specific problems. The provisions of the 1978 act are well understood and provide notice and certainty in franchise contracts. I am particularly interested to hear the witnesses' testimony on the bill's introduction into the PMPA of new terms of art such as "economically necessary" and "fair and reasonable", and the impact of these new terms on contract certainty and business trends.

Thank you, Mr. Chairman.

II

100TH CONGRESS
2D SESSION

S. 2179

To amend the Petroleum Marketing Practices Act.

IN THE SENATE OF THE UNITED STATES

MARCH 16 (legislative day, MARCH 14), 1988

Mr. FORD introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

---

A BILL

To amend the Petroleum Marketing Practices Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Petroleum Marketing Practices Act Amendments of 1987".

SEC. 2. DEFINITION.

Section 101(1)(B) of the Petroleum Marketing Practices Act (15 U.S.C. 2801(1)(B)) is amended—

(1) by striking out "(iii)" and inserting in lieu thereof "(iv)"; and

(2) by inserting the following new clause after clause (ii):

"(iii) any contract between the parties described in clauses (i) through (iv) of paragraph (1)(A) which is economically necessary to the operation of the franchise; and".

SEC. 3. GROUNDS FOR NONRENEWAL IN CERTAIN CASE.

Section 102(b)(3)(A) of the Petroleum Marketing Practices Act (15 U.S.C. 2802(b)(3)(A)) is amended—

(1) by striking out "and" at the end of clause (i);

(2) by striking out the period at the end of clause (ii) and inserting in lieu thereof "; and"; and

(3) by adding at the end the following:

"(iii) such changes and additions are fair and reasonable.".

SEC. 4. NEGOTIATION OF UNDERLYING LEASE.

Section 102(c)(4) of the Petroleum Marketing Practices Act (15 U.S.C. 2802(c)(4)) is amended by adding at the end:

"and if, in any case in which the franchisor has an option to renew such underlying lease or purchase such premises, the franchisor provides, at least 90 days before the date on which such option expires, the franchisee with the name, address, and phone number of the owner or lessor of the underlying lease and agrees not to use this paragraph as a ground for nonrenewal or termination during any term during which the franchisee is able to retain possession of the premises as a result of any agreement entered into with the owner or lessor of such premises;".

Senator NICKLES. Mr. Chairman, just a couple of comments. Let me ask you first, I do not know exactly what your intentions are. Are you trying to pass this piece of legislation this year, or are we just having hearings to lay the groundwork for next year?

Senator FORD. Well, I think there is a little bit of possibility of both, because talking to the leadership on both sides we might be here another week, so everybody is trying to put everything on little bills, you know. So if you all wanted to keep on talking while we will be here, we might have a bill or two yet to come out of this place, you know. Let me just tell you a story——

Senator NICKLES. That was not what I wanted to hear.

Senator FORD. I understand. But let me just tell you a story. I was campaigning down in Western Kentucky—and you-all just relax for a minute. I am going to tell one of my stories. I was campaigning down in West Kentucky and I was going around the courthouse in this West Kentucky county, and they were whittling and spitting down on the curb, you know, and I was walking around shaking hands with them, telling them who I was and what I was running for, and I came up to this fellow had a razor-sharp double X, and he had this cedar stick and he was putting those fine shaves off of it, you know, and they were round his feet, and I shook hands with him and tried to make a little conversation. I said, "It sure is hot, isn't it?" And he said, "Yep. It happens this time every year." Well, this is the closing of the session, and it happens this time at the closing of every session; and so whatever happens, I am not going to be surprised, Senator.

Senator NICKLES. Well, let me make a few more comments then.

Senator FORD. Okay.

Senator NICKLES. For the record, I think it is important that we have this hearing today on S. 2179 to help the Committee determine whether there are any problems in the Petroleum Marketing Practices Act of 1978 that require congressional action, and whether the pending legislation would correct those problems.

In my opinion, it is too late for the 100th Congress to act on this legislation. I think this hearing this morning will be helpful in determining the legislative priorities for the Committee for next year, but again I happen to believe that it is too late for this type of legislation this year.

I am very concerned that the Departments of Energy and Justice have not been invited to testify at today's hearing because their impartial expertise is essential to a complete hearing record. In addition, I note also missing from the witness list is the Federal Trade Commission, the agency charged with overseeing the PMPA.

Accordingly, it is clear the Committee must hold additional hearings on the Petroleum Marketing Practices Act before it contemplates changing the current law. Since oil decontrol in 1981, the petroleum marketing industry has made enormous changes to adapt to evolving customer demands, and these changes have occurred in the presence of the PMPA which provides a framework for franchise rights and for resolution of conflicts.

An important aspect of today's hearing is whether passage of S. 2179 would restrict the ability of the industry to continue to respond to market-driven change, and what effect those restrictions would have on consumers. This bill, as I understand it, has been supported by independent service station dealers, franchisees, and is opposed by the refiners, the jobbers, the change-marketers and the franchisors. The potential for inequitable treatment by franchisors makes it especially important that Congress listen carefully to the dealers' concerns.

In particular, I look forward to today's testimony on the adequacy of the PMPA to prevent overreaching any one segment of the industry over another, and whether S. 2179 if enacted would correct that overreaching.

At the same time, the limited support for S. 2179 should caution us to consider carefully what the Congress should be doing about changing PMPA, especially if those changes will materially alter existing contracts to the advantage of one group over another. The PMPA was carefully crafted to balance the equities and longstanding relationships in the petroleum marketing industry, and should not be changed without careful deliberation.

In addition, I look forward to hearing the witnesses comments on whether S. 2179 may be an overly broad solution for specific problems. The provisions of the 1978 act are well understood and provide notice and certainty in franchise contracts.

I am particularly interested in hearing all of our witnesses' testimony on the bill's introduction into the PMPA on the new terms of art such as "economically necessary" and "fair and reasonable" and the impact of these terms on contract certainty and business trends. I am not exactly sure what "economically necessary" and "fair and reasonable" mean when I look at the bill. I would like to hear from our witnesses what that would mean in your contracts, what it would mean in your relationships between the franchisees and franchisors. I think it is awfully important that we know what the legislation would do.

So with that, Mr. Chairman I thank you for allowing me to make a few comments and I look forward to today's hearing.

Senator FORD. I might advise my colleague and friend that the Federal Trade Commission was asked to testify over two weeks ago, and that was not sufficient time for them to prepare for this hearing. If that is true then I think we ought to clean them out and see if we could not get a new Federal Trade Commission, because surely two weeks should be plenty of time and that would have answered some of your questions here this morning, hopefully, and mine.

So they were invited, and I see this piece of legislation as one that gives the little guy an opportunity to fight City Hall, and under the circumstances it is very difficult, as you know, to fight City Hall. In this case, as the major oil companies have stacks and stacks of lawyers and the little guy down there trying to take Mrs. Ford's car and get it started in the rain is having a danged hard time staying in business.

[Subsequent to the hearing the following letter and memorandum were submitted for the record:]

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

October 24, 1988

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Energy Regulation
  and Conservation
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During the Subcommittee's October 4, 1988, hearing on S.2179, to amend the Petroleum Marketing Practices Act, Senator Wendell H. Ford, who presided at the hearing, stated to Senator Don Nickles, "I might advise my colleague and friend that the Federal Trade Commission was asked to testify over two weeks ago, and that was not sufficient time for them to prepare for this hearing. If that is true then I think we ought to clean them out and see if we could not get a new Federal Trade Commission, because surely two weeks should be plenty of time and that would have answered some of your questions here this morning, hopefully, and mine." (Tr. pp.8-9)

I am writing to correct the record with regard to the substance of Senator Ford's statement. The Federal Trade Commission was not invited to testify at the hearing, nor were we provided with two weeks notice that a hearing was to occur. In fact, Commission staff initiated discussion with Subcommittee staff a short time before the hearing to learn more about it. We did not receive a formal invitation from the Subcommittee to appear at the hearing, nor were our views formally requested by letter. Had we been invited, I can assure you that the Commission would have participated at the hearing, either through oral testimony or a written statement.

Accordingly, I respectfully request that this letter be made part of the October 4, 1988, Subcommittee hearing record on S.2179. The Commission stands ready to participate, if invited, at future Subcommittee hearings.

Sincerely,

Daniel Oliver
Chairman

cc: The Honorable J. Bennett Johnston
The Honorable James A. McClure
The Honorable Don Nickles
The Honorable Wendell H. Ford

United States Senate

October 26, 1988

MEMORANDUM

TO: Mike Harvey, Chief Counsel

FROM: Joel Saltzman, Counsel

RE: FTC letter regarding October 4, 1988 hearing on S. 2179, Petroleum Marketing Practices Act Amendments.

On October 24, 1988, the Committee received a letter from Daniel Oliver, Chairman of the FTC, alleging an error in a comment made by Senator Ford while chairing the October 4, 1988, hearing on S. 2179. Chairman Oliver's letter stated that, contrary to Senator Ford's contention, the FTC did not receive a formal invitation to testify or submit its written views, nor did it receive two weeks notice of the hearing.

The hearing was noticed in the Congressional Record on September 23, 1988, eleven days before the hearing occurred. Apparently, minority staff called the congressional affairs office of FTC, alerting the Commission, because that office contacted me by telephone shortly thereafter.

I explained to the FTC official the nature and scope of the hearing, and asked him whether the FTC would like to testify in person or submit a statement.

The official stated that he would check, but believed that a period less than two weeks was an insufficient time to get the drafting, review and "signoffs" necessary to participate. I responded that, as a result of that assessment, I would not prepare a formal, written invitation to testify.

Subsequently, I called the FTC congressional affairs office to inform the Commission as to the persons appearing, and order of the witness list. I spoke to an official other than the one I spoke to concerning the Committee's oral invitation to participate, but I no longer have notes as to either of their names.

Senator Ford. So with those little additional comments, we will ask Mr. Probus to begin his testimony and then we will have Mr. Kane that will have a portion of that; then we will go to Mr. Chisholm and Mr. Smith. Mr. Probus?

STATEMENT OF EMMETT E. PROBUS, PRESIDENT, SERVICE STATION DEALERS OF AMERICA, INC., ACCOMPANIED BY JIM DASKAL, COUNSEL

Mr. Probus. Good morning, Mr. Chairman, Senator Ford, ladies and gentlemen. I am Emmett Probus, President of SSDA. I am one of the five thousand or so who are fortunate enough to be Shell Oil dealers. I have been a Shell dealer for the past eighteen years, and this has been a fair and a pleasant relationship.

Being and staying a service station dealer is a continuing challenge and requires changing with the times. Shell has allowed me to change my operation over the years from a full-service facility doing auto repairs to a combination full-serve self-serve gas and a C-store, or foodmart without auto repairs. This ability to adapt to change has allowed me to remain competitive and to survive as an independent businessman.

However, as you should expect most of these changes have come at my own expense and consequently the total investment for remodeling, walk-in coolers, deli equipment, all these changes in my operation have cost me about a quarter of a million dollars. Investments of this size by dealers are not uncommon in the service station industry today.

Mr. Chairman, the nation's 100,000 gasoline retailers and many small jobbers are deeply grateful for this hearing. We have come here from across the United States to tell us about an unprecedented onslaught on the nation's retailers made possible by an Act of Congress that was intended to help them.

We have also come to tell you that unless this committee is willing to take the first step and act to restore a balance between retailers and their suppliers, as Chairman John Dingell and Senator Henry Jackson intended in this 1978 Petroleum Marketers Practices Act, this American institution of small businessmen is dead.

The act today is being used more to eliminate dealers than to help them—often by oil companies promoting company operations in contravention of the act. Dealers are being forced to sign take-it-or-leave it leases with provisions so coercive that signing one can be an agreement to self-destruction. Oil companies can now force a dealer to accept any lease provision if their determinations are made as a result of their interpretation of what constitutes good faith in the normal course of business, as stipulated in the act. The kicker is that under PMPA failure to agree to any provisions proposed by the supplier in "good faith" is grounds for nonrenewal.

Unreasonable franchise provisions have resulted in dealers being cancelled for not being able to sell unattainable minimum volumes even though their wholesale prices are competitive. They must agree to 24-hour operation and risk employees' lives when there is no business to justify it.

Dealers have been given rent increases of 1,000 percent because an oil company imposes its own appraisal of real estate value. Gulf dealer Bruce Smith of Pittsburgh last year received a new lease with a rent increase going from $2,500 per month to $26,500 per month in its third year. Super jobber Cumberland Farms bought the location from Gulf eight months earlier for $244,000, and used its own appraisal of $2.5 million to justify the new rent, which is obviously intended to force the dealer out.

Dealers are now being forced to sign bulldozer clauses which allow a company with thirty days' notice to bulldoze a dealer's location and rebuild it as a convenience store or a pumper without service bays. Thousands of locations are now being converted annually.

A major misinterpretation of the intent of PMPA language by a Federal judge in *Baldauf* v. *Amoco* in 1981 opened the floodgates for conversions. Many are used to force dealers out by including huge rent increases based on promised new profits which never materialize. The dealer is forced out and the location becomes a company operation.

In other cases, oil companies have used expiration of underlying leases to close dealer-operated stations that would offer competition to new company-operated facilities that appropriate the dealer's goodwill. Dealers and their customers have been forced to pay as much as 20 cents per gallon more for gas when refiners have passed on price reductions to their other customers but not to their own captive dealers.

A letter from Chevron's Atlanta office threatened jobbers with termination for the crime of selling Chevron gasoline to dealers 15 cents per gallon cheaper than the dealer could purchase from Chevron. The dealers were threatened with termination for the crime of offering lower prices to their customers.

The motivation behind the majors' onslaught on retailers and small jobbers is to maintain market control as clearly detailed in Arco's SPU document which was subpoenaed by the Nevada legislature last year. The Arco SPU document is attached to our written testimony.

Arco points out that its market control is eroding as consumers go to the lowest price mode of delivery, independent stations, and that the consequences of losing market control would result in marketers driving refinery prices down as competition moves from the street to the refinery gate.

Avoiding competition at the refinery level is at the heart of the refiner's efforts to retain market control. Arco points out that while forcing its dealers out by charging them higher prices, the returns from huge station rent increases can compensate for lower sales.

Arco's paper acknowledges that it will have a period of lower profits before its goal of market control can be achieved but says, "Lastly, depending on the degree of rapidity of competitive attrition, a lasting period of quite acceptable profitability could ensue."

Mr. Chairman, PMPA is now 10 years old, and every independent scholarly analysis of it says it does not work. It should not require an Act of Congress to give small businessmen the right to negotiate a lease. On behalf of all the 90,000 service station dealers of America and their 750,000 employees, I ask that you please act now to help save this important American industry. Pass Senate bill 2179.

Thank you.

[The prepared statement of Mr. Probus follows:]

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SERVICE STATION DEALERS OF AMERICA

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JOSEPH L. KOACH, CAE
Executive Director

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NORTH DAKOTA RETAIL GASOLINE DEALERS ASSN
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WISCONSIN RETAIL GASOLINE & AUTOMOTIVE TRADES ASSN

TESTIMONY BY

EMMETT E. PROBUS
PRESIDENT

SERVICE STATION DEALERS OF AMERICA, INC.

ON

S.2179

PETROLEUM MARKETING PRACTICES ACT
AMENDMENTS OF 1987

BEFORE THE

SENATE SUBCOMMITTEE ON ENERGY REGULATION & CONSERVATION
OF THE ENERGY AND NATURAL RESOURCES COMMITTEE

OCTOBER 4, 1988

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Third Vice President
Indianapolis, IN

MARY ANN RAGONA
Treasurer
Patchogue, NY

Mr. Chairman:

The nation's 100,000 gasoline retailers and many small jobbers are deeply grateful for this hearing.

We have come here from across the U.S. to tell you about an unprecedented onslaught on the nation's retailers, made possible by an Act of Congress that was intended to help them.

We have also come to tell you that unless this committee is willing to take the first step and act to restore a balance between retailers and their suppliers, as Chairman John Dingell and Senator Henry Jackson intended in his 1978 Petroleum Marketing Practices Act, this American institution of small businessmen is dead.

The Act today is being used more to eliminate dealers than to help them, often by oil companies promoting company-operations in contravention of the Act.

Dealers are being forced to sign take-it-or-leave-it leases with provisions so coercive that signing one can be an agreement to self-destruction.

Oil companies can now force a dealer to accept any lease provision if their determinations are made as a result of their interpretation of what constitutes good faith in the normal course of business, as stipulated in the Act.

The kicker is that under PMPA, failure to agree to any provisions proposed by the supplier in "good faith", is grounds for non-renewal.

Unreasonable franchise provisions have resulted in dealers being cancelled for not being able to sell unattainable minimum volumes, even though their wholesale prices are uncompetitive.

They must agree to 24-hour operation and risk employee's lives when there is no business to justify it.

Dealers have been given rent increases of 1,000% because an oil company imposes its own appraisal of real estate value. Gulf dealer Bruce Smith (here) in Pittsburgh, last year, received a new lease with a rent increase going from $2,531 per month to $26,500 per month in its third year. Super-jobber Cumberland Farms bought the location from Gulf eight months earlier for $244,000 and used its own appraisal of $2.5 million to justify the new rent which is obviously intended to force the dealer out.

Dealers are now being forced to sign bulldozer clauses which allows a company, with 30-days notice, to bulldoze a dealer's location and rebuild it as a convenience store/pumper without service bays. Thousands of locations are now being converted annually.

A major misinterpretation of the intent of PMPA language by a federal judge in Baldauf vs. Amoco in 1981, opened the floodgates for conversions.

Many are used to force dealers out by including huge rent increases based on promised new profits which never materialize. The dealer is forced out and the location becomes a company-operation.

In other cases, oil companies have used expiration of underlying leases to close dealer-operated stations that would offer competition to new company-operated facilities that appropriate the dealer's goodwill.

Dealers and their customers have been forced to pay as much as 20¢ per gallon more for gas when refiners have passed on price reductions to their other customers, but not to their own captive-customer dealers.

A letter from Chevron's Atlanta office threatened jobbers with termination for the crime of selling Chevron gasoline to dealers 15 cents per gallon cheaper than the dealer could purchase from Chevron. The dealers were threatened with termination for the crime of offering lower prices to their customers.

The motivation behind the major's onslaught on retailers and small jobbers, is to maintain market control as clearly detailed in Arco's SPU document which was subpoenoed by the Nevada Legislature last year. (The Arco SPU document is attached to our written testimony.)

1. Arco points out that its market control is eroding as consumers go to the lowest price mode of delivery (independent stations) and that the consequences of losing market control would result in marketers driving refinery prices down as competition moves from the street to the refinery gate.

Avoiding competition at the refinery level is at the heart of the refiners' efforts to retain market control.

2. Arco points out that while forcing its dealers out by charging them higher prices, the returns from huge station rent increases can compensate for lower sales.

3. Arco's paper acknowledges that it will have a period of lower profits before its goal of market control can be achieved but says, "Lastly, depending on the degree of rapidity of competitive attrition, a lasting period of quite acceptable profitability could ensure . . ."

Mr. Chairman, PMPA is now 10 years old and every independent scholarly analysis of it says it does not work. It should not require an Act of Congress to give small businessmen the right to negotiate a lease. That's all S.2179 does.

SSDA®
SERVICE STATION DEALERS OF AMERICA

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JOSEPH L. KOACH, CAE
Executive Director

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TESTIMONY BY

SERVICE STATION DEALERS OF AMERICA, INC.

ON

S.2179

PETROLEUM MARKETING PRACTICES ACT AMENDMENTS OF 1987

BEFORE THE

SENATE SUBCOMMITTEE ON ENERGY REGULATION & CONSERVATION OF THE ENERGY AND NATURAL RESOURCES COMMITTEE

OCTOBER 4, 1988

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MARY ANN RAGONA
Treasurer
Patchogue, NY

In 1978 this subcommittee, under the leadership of Senator Henry Jackson, passed the PMPA, legislation which recognized that the petroleum industry franchise is at minimum a joint venture, and in the view of many, a fiduciary relationship.

Congress recognized that service station dealers have substantial investments in their locations, and that these investments, which ultimately inure to the benefit of the consumer, deserved some protection.

Ten years later, dealers across the country are still being given franchise agreements on a take-it-or-leave-it basis, with no opportunity to negotiate, just as they were prior to the passage of PMPA, despite the fact that this subcommittee and its chairman unequivocably stated that the primary aim of the legislation was to equalize the bargaining power between dealers and their suppliers.

The situation has worsened to the point where PMPA is actually being used as a weapon against dealers and to stifle competition they provide.

For example, in California we have over 50 examples of dealers who purchased their stations pursuant to PMPA, but were subsequently faced with a concerted refusal to supply gasoline by major oil companies, who then took the further step of prohibiting their jobbers from supplying the dealer-owned stations.

Another example is in the area of third-party leases, where the franchisor does not own the premises, rather they lease the premises from a third party. Often, the franchisor will have either multi-year options to renew the underlying lease or options to purchase the property. The law does not require the purchaser to pick up these options or to transfer them to the incumbent dealer, despite what the Third Circuit stated in Lugar v. Texaco, 755 F.2d 52 at 58, 59: "We recognize that there are strong policy considerations that a franchisor should be obliged to offer to sell, assign, or transfer its option to purchase the premises ..."

Refiners argue that they use this provision only to withdraw from uneconomical locations.

As revealed in a recent case, Boschert v. Shell, 666 F.Supp. 948, arising out of the Dallas metroplex, refiners often close these locations due to new company-operated locations they are opening up the street. As far as disengaging from uneconomical locations, Section 2802(b)(3)(D) of the Act allows refiners to do so, contingent on allowing the dealer the opportunity to purchase the location at fair market value, and thus remain as a competitor in the marketplace. This competition is what refiners attempt to stifly by terminating underlying leases.

I. Franchise Renewals Still Being Offered On A Take-It-Or-Leave-It Basis, With No Opportunity For Negotiation

A recurrent theme throughout the legislative history of PMPA, in the hearing records, committee reports, and Floor statements was that the Act was intended to equalize the bargaining power between powerless franchisees and franchisors.

Ten years later, franchise renewals are still being offered on a take-it-or-leave-it basis.

At a recent meeting of Midwestern Amoco dealers, the dealers asked that they be given their franchise agreements in advance of renewal time so that they would have the opportunity to study the proposal.

Amoco's response was that this "could be arranged"; however, if the purpose was to allow the dealer's attorney to review the proposal, this was a waste of time and money, as the leases were non-negotiable.

A few courts have also claimed that franchisors have no duty to negotiate; see, e.g., Drazin v. Amoco, 1981-1 Trade Cases §64,097. We submit that this is a true perversion of the original intent behind PMPA, and demonstrates why this statute must be amended.

II. The Meaninglessness Of "Good Faith And Normal Course Of Business"

The primary problem with PMPA is that the good faith, normal course of business test has become meaningless.

In the first PMPA case to be heard by an en banc panel, 7 of 8 judges of the United States Court of Appeals for the Third Circuit described the good faith test as ephemeral, without content, and stated a franchise will virtually never be able to show its absence. Slatky v. Amoco, 830 F.2d 476, 482 (3d Cir. 1987) (en banc).

Similarly, every piece of legal scholarly commentatory reviewing PMPA has stated that the law provides no real protections for franchisees, because of the meaninglessness of the "good faith" test.

The prestigious publication "The Antitrust Bulletin" states, "Despite the detailed listing of what constitutes good cause for termination or non-renewal, the PMPA contain no definitions of the term 'good faith'. It has been suggeste that the lack of an objective test of good faith renders the good cause requirements meaningless."

In Duquesne Law Review, the commentator concluded the narrow interpretation of the term good faith made clear that PMPA offers a franchisee little protection against termination or non-renewal.

In Emory Law Journal, the commentator concluded that judicial interpretation of PMPA has frustrated Congressional intent and allowed franchisors to terminate their franchisees arbitrarily.

In Cleveland State Law Review the commentator stated "the subjective good faith test that is used grants to the franchisors a great deal of discretion in citing a cause for termination. In other words, when termination is desired, the can find good cause."

Finally, in the ABA's Business Lawyer publication, the commentator notes that interpretation of PMPA has denied the Congressionally intended protection to franchisees, the statute's intended beneficiary, primarily due to the absence of a test of objective reasonableness as to changes or additions to franchise terms.

Thus, legal scholars are unanimous that the good faith test is the Achilles heel of PMPA, and is the primary reason the statute is not working as originally intended.

The PMPA good faith test has become so meaningless that we can have documents such as the Arco SPU which plan the demise of dealers through massive rent hikes (which dealers have no choice but to agree to) and converting the stations to company-operation without even mentioning PMPA. This is because PMPA is no barrier to a franchisor proposing "good faith changes and additions to a franchise" which means self-destruction for the dealer.

Moreover, new franchise agreements, such as Shell's, actually attempt to force dealers to agree to give up rights they have won in hard fought court battles.

In the seminal cases of Barnes v. Gulf Oil and Felts v. Amoco, dealers stopped franchisors from circumventing the provisions of PMPA requiring a franchisor to give the dealer a bona fide offer or right of first refusal to purchase the location the dealer has invested in before the franchisor could sell the premises to a third party. Shell's new lease requires a dealer to give up these rights.

If PMPA were working as intended, such efforts would not be made. The fact they are, demonstrates why the law must be amended.

III. Fair And Reasonable Requirement Makes PMPA Consistent With Other Trade Regulation Laws, State Franchise Laws, and Internally Consistent

It is difficult to see how anyone can rationally argue that changes to franchise agreements not be "fair and reasonable." Such a change would bring PMPA into line with existing trade regulation law.

Under our existing antitrust laws, the legality of marketing terms and conditions imposed on retailers by suppliers are judged by their reasonableness.

Arco's testimony against the fair and reasonable requirement at last year's hearing brings home the point that oil companies should be held to the same standard as every other supplier in the country, that is, "fair and reasonable".

Arco states: "Existing antitrust and state franchise laws dictate certain courses of action by franchisors to prevent unfair marketing practices and discrimination in treatment between individual members of classes of trade." What Arco fails to state is that the existence of the reasonableness standard under these laws has not affected the ability of manufacturers and suppliers to impose uniform, reasonable marketing terms on their retailers.

In short, the idea that "fair and reasonable" contract terms would prevent refiners from adopting uniform policies is empty rhetoric, wholly unsupported by the history of the reasonableness requirement under federal and state antitrust and trade regulation laws.

Second, PMPA itself already contains reasonableness requirements in two areas.

Section 102(b)(2)(A) [15 USC 2802] of PMPA allows termination of a franchise or non-renewal of a franchise relationship if the franchisee fails to comply with a provision of the franchise which is both reasonable and of material significance to the contract.

If a dealer attempts to challenge a termination on these grounds, the termination will be upheld if the contract provision is reasonable. By contrast, if at time of renewal a franchisee fails to agree to changes to the franchise agreement made "in good faith", he can be non-renewed. Additionally, Section 102(b)(2)(C) allows termination if an event occurs that makes termination of a franchise or non-renewal of a franchise relationship reasonable.

Moreover, Section 2802(b)(3)(D) allows refiners to disengage from uneconomic locations despite reasonable changes and additions a dealer may agree to.

The existing reasonableness requirements to PMPA have neither prevented refiners from adopting uniform policies, nor have they generated the predicted flood of litigation.

Third, many state laws regulating petroleum industry franchises require the franchisor's terms of renewal of the franchise be reasonable. See, e.g., Arkansas Dealer Day In Court bill.

Many "unbranded" dealers enjoy the protection of the reasonableness requirement. Branded dealers deserve similar treatment.

Finally, refiners have objected to "fair and reasonable" as they claim it will generate a flood of litigation. This position is not substantiated by the history of PMPA and other laws with a reasonableness requirement. Further, it totally ignores the realities of the dealer-refiner relationship.

The dealer-refiner relationship is a joint venture, or partnership. Obviously, any business in which partners are spending time and money suing one another is not going to be a viable business.

It is a tremendous step for your neighborhood service station dealer to sue one of our giant oil companies. For every suit brought by dealers in such cases, perhaps 100 dealers submit without a fight. Such litigation takes tremendous amounts of time and money which a dealer cannot afford to spend. Dealers litigate against the oil companies only in a last resort, matter of survival situation.

IV. Objections To Fair And Reasonable Are Mere Rhetoric That Ignores Real World Of Dealer-Supplier Relations

In previous hearings, opponents of this legislation have claimed the reasonableness requirement will burden the courts with floods of litigation, makes courts the final arbitrator of contracts, and other claims that boggle the imagination.

These arguments ignore the real world and conveniently ignore the fact that under our antitrust laws, other trade regulation statutes and state franchise laws, courts can and have been directed to scrutinize the objective reasonableness of the relationship involved.

For example, if a refiner tells one of its jobbers it can only sell product in a certain territory or cannot sell to certain dealers, the antitrust laws require the restraint to meet the Rule of Reason.

Pennsylvania's Gasoline Marketing Practices Act requires franchisors to treat franchisees not only in good faith, but also in a commercially reasonable manner.

More importantly, these arguments ignore the fact that dealer-supplier relationship is at a minimum a joint venture and in the view of many incorporates fidiciary responsibilities.

The simple fact of the matter is that one does not stay in business long by suing one's much more powerful partner.

It further ignores the reality of how the act works. The reasonableness test comes into play only when there is a non-renewal based on failure to agree to new terms. The dealer who fails to agree is risking his or her livlihood on a lawsuit which, if he or she loses, is out of business. The dealer's business decision is a far different matter than the legal decision.

Dealers will undertake this great risk and spend the hundreds of hours and thousands of dollars only in a "life or death" situation.

The myth refiners are trying to create, that dealers will litigate every contract change and that court's are going to dictate terms, is absurd, and should be categorically rejected by this subcommittee.

V. Need To Amend Franchise Definition

A typical franchise in this industry consists of a series of contracts including a real estate lease, a motor fuel supply agreement, agreement for "ancillary profit centers" such as convenience stores or service bays, credit card, signage agreements, and others.

Refiners have been able to cherry-pick these agreements and economically evict franchisees by means such as terminating ancillary profit centers while allowing the motor fuel marketing contract to stay in effect (Smith v. Arco), or denying certain dealers the right to honor the credit card, even thous a substantial percentage of sales were on the card (see Aldrich v. Amoco, an Iowa case which is not longer good law even in its own 8th Circuit due to the Felts case; however, Felts did not address the credit card issue).

This amendment makes clear that certain ancillary agreements are integral part of the franchise, and cannot simply be terminated at a franchisor's whim.

VI. Third-Party Leases

As extensively discussed in our opening paragraphs, refiners have used expiration of underlying leases to stifle competition. This amendment would bring a halt to these practices.

CONCLUSION

There is no question that after 10 years PMPA needs amending if it is to live up to the intent of its sponsors.

The legislation before you will require franchisors to negotiate contract changes with their franchisees, and require the franchisor to take into account the effect of its proposal on the franchisee, rather than simply imposing its own selfish will on franchisees.

It will further prevent refiners from using PMPA to stifle competition from independent dealers.

What it will not do is create floods of litigation predicted by opponents.

The case for amending this law is compelling. We urge the subcommittee to act without delay.

TWIN CITIES DISTRICT

1987

DEALER ADVISORY COUNCIL

ALEXANDRIA, MINNESOTA

The Twin Cities District 1987 Dealer Advisory Council convened at 7:00 a.m., Thursday, May 14, 1987, at Radisson Arrowwood, Alexandria, Minnesota.

District Manager, Don Clark, opened the meeting stating the purpose of the Dealer Advisory Council and the need to keep a positive discussion of problems, ideas and concepts.

During the breakout session, the dealers were challenged to establish a positive, meaningful agenda and to elect a Chairman and Secretary.

The Advisory Council reconvened at 11:00 a.m., Thursday, May 14, 1987. The Council reported that Loren Dusterhoft, Grand Forks, North Dakota, was elected as Council Chairman and that Jerry Rens, Rochester, Minnesota, was elected Council Secretary.

Council Chairman, Loren Dusterhoft, made a comment that dealer morale is "rock bottom" and they feel that Amoco's treatment of dealers is very poor and that Amoco dealers deserve better.

Session Begins

Dealers: We would like Amoco TBA to eliminate the "brackets" used to price TBA. This system is complicated and forces dealers to combine orders. We recommend one "low" price for all.

Amoco: The "brackets" prices are liked by those dealers who purchase large quantities of TBA. Smaller dealers, naturally, would not care for the system. Amoco is constantly reviewing prices and latest marketing trends; they look at "free goods" and at "regional trends and products."

Dealers: We are suggesting that Amoco price TBA using one low, net price and to streamline the TBA pricing structures.

Amoco: Amoco has looked at "net" pricing of TBA products. Pool purchases do not work for all dealers; large dealers do not need to pool orders.

Dealers: Can we still get split billing between dealers?

Amoco: Yes. If you purchase a truckload of tires, Amoco will deliver to four different drop points and split the billing.

Amoco: Amoco will offer a one-year trial franchise to those dependents who demonstrate the desire and capacity to operate a service station. Territory Manager will conduct interviews with the relative and make recommendations accordingly. Remember, Amoco cares about you and other dealers because Amoco is the only supplier who still has direct/supplier lease arrangements in our district area.

Dealers: We ask that renewal station leases be given to us earlier so that we can look them over.

Amoco: This can be arranged, however, if your purpose in getting lease earlier is for an attorney to examine, this is expensive and unnecessary. Terms of a lease are not negotiable nor will Amoco change terms for a dealer.

Dealers: We understand that the Chicago District offers 24-hour rent incentive. Why can't we have the same?

Amoco: The Zone is phasing the test program out. It will be discontinued in the Chicago District next year, as will it in the Twin Cities test area.

Dealers: What programs are available and never offered to all dealers, especially those outside the metro area?

Amoco: We can think of one -- guaranteed income. This was discontinued because our experience of some dealers not being able to offer accurate records.

Dealers: Can Amoco offer their retail customers some type of incentive for large purchases on a monthly basis?

Amoco: This has been tried before without any great success. The problem is establishing what is a "large purchase." One customer feels that 50 gallons is a lot, whereas the next feels his 500 gallon purchases are "large".

Dealers: Allstar program seems to be neglected. We are not happy with audits.

ARCO SPU

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Date: January 14, 1982

Subject: SPU MEETING
January 26, 1982

From/Location: J. S. Morrison

To/Location: E. M. Benson
L. M. Cook
R. F. Cox
J. P. Downer
B. W. Duker
W. F. Kieschnick
R. E. Wycoff

We have a significant agenda to cover at the January 26th SPU. We think it fair and constructive to provide you, in advance of the session, with two pieces:

1. An outline of the preamble I shall be giving, and
2. A paper that has been circulated and discussed among a small, select group within ARCO Petroleum Products Company.

It is requested this material be treated on a very confidential basis with no copies or further distribution.

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ATTACH.

cc: Mr. J. W. Simmons

Bob. K[illegible]
Kusch
[illegible]

I hereby attest and certify on May 15, 1987 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Jo A. Nunez Deputy

RECEIVED MAY 29 1987

Ex. 23

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SPU DISCUSSION OUTLINE

ROLE OF REFINING - MARKETING

- Stand-alone cash generator
- Crude price buffer (not captive market)

V

ESSENTIAL INGREDIENTS

- Refining with its high entry cost
- A critical mass of market control (meaning a stable, reliable portfolio of customers)

THE PROCESS

- Market control provides refinery (and crude utilization) stability
- Refining and marketing, as a unit, absorb marketplace fluctuations --- product prices increased after period of losses
- Refineries pay relatively stable posted crude price

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PROCESS BREAKING DOWN

- Surplus refining with condition to worsen
- Market control eroding as consumer goes to lowest price mode of delivery (independent stations)

CONSEQUENCES OF LOSING MARKET CONTROL

- Marketers drive refinery prices down --- competition moves from street to refinery gate.
- Refiners get lower crude prices or perish
- Equalibrium comes only when enough refining is closed (40-50%).
- Equalibrium restores value of captive refinery for proprietary crude

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CONCLUSIONS

- Control of a critical mass of marketing essential
- Traditional two-tier, major-independent, market system no longer able to co-exist

REQUIREMENT

- ***Head off loss of market control!!!***

SPU MAIN DISCUSSION

- Demonstrate need, how to do it and range of results

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REFINING AND MARKETING OF GASOLINE

The decline in gasoline demand is causing a fundamental shift in the balance of power in the refining and marketing business. It is a shift mainly favoring the independent marketers. Prior to the seven-year hiatus of controls, demand growth enabled major companies to maintain the status quo volumetrically even though independent marketers were gaining share of market during the sixties and early seventies. During the control period, price competition was essentially eliminated and the entire problem papered over because refineries were pushed to the hilt and every barrel earned some profit.

Price competition has now been restored and the environment is one of declining demand for the next few years. To the extent independent marketers grow, as they are, or even just hold their own, the drop in demand falls on the majors. This produces two very deleterious and broad reactions which constitute an unfavorable, self-perpetuating dilemma for the majors:

1. Under-utilized refineries must be cut further or increased sales made to independents. Cutbacks in partially used refineries are costly. Independents, with purchase options, demand and receive a price enabling them to grow or, at least, retain share of market. With surplus refining capacity, the individual refiner is powerless to break the cycle --- and because of incremental economics is driven to participate because the alternative, at least over the short-term, is worse.

2. Static to declining volumes in the major brand marketing, coupled with inflation, cause branded dealers to require higher margins which can be obtained by either:

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(i) raising the retail price which ultimately drives more business to the independents, and/or

(ii) obtaining assistance from the major company supplier (rebates, rent concessions) which eventually leads the independent to demand a comparable price cut.

The closure of sufficient refining capacity could theoretically solve the problem. And a case can be made that the majors will resort to this because taxation has capped producing profits and the enormous capital needed to find replacement reserves will simply not permit downstream subsidization. While some further refinery closings and marketing regionalizations may occur, it is unrealistic to expect, or rely on moves of this nature to solve the problem. Pride, ignorance of the real losses, the desire to avoid write-offs, simple inertia, vested interests and a "wait for the other guy" approach all work against enough such closures and withdrawals in a reasonable time frame. But most of all, the incremental refining cost feature ensures resistance to partial closures.

The consumer preference for lower prices is making the traditional higher priced (and higher cost) branded outlet concept un-workable. Trying to maintain this structure while supplying the lower price independent outlets is becoming impractical and may soon be economically impossible. The root problem that really must be changed is the two tier market system for gasoline.

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L.A.S.C. C423917

[illegible] conditions and circumstances no longer dominant in the marketplace. A complete paper could be written on the subject, but briefly the branded market rested on the combination of superior locations and facilities (the independent was a middle-of-the-block-dump); full service and a lock on oil, battery, tires, tune-up and "running repairs" work; a one or two cent price spread on a thirty cent gallon with free credit at that and a constant, wide-spread advertising effort to convince the motorist the branded gasoline was qualitatively better. Except for free credit, not a one of these conditions is any longer present or viable.

The statistics are quite clear about price becoming more the dominant factor with the motorist. The customer demanding pump service will leave a niche for some traditional branded outlets, but these will primarily be "neighborhood" units. The customr demanding the credit privilege will also be locked into branded; however, the majority of these are thought to be the same customers that want service. The sector of the market growing by leaps and bounds is the customer quite willing to pump his own gas and, even at a major brand station, save more than a dollar for three minutes effort.

Most alarming of all is that this customer no longer feels the product is differential and he clearly sees independent locations are abundant, clean, handy and, in many cases, faster. How long is he going to pass up another five to seven cents per gallon saving available at the independent self-serve? One might postulate the credit card will help but there is no trend to indicate the self-serve business is differentially heavy in credit card sales.

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If the price spread between branded and independent self-serve widens, as the balance of power shift alluded to earlier makes likely, the "switch over" rate will accelerate. At some critical threshold, the process could snowball very rapidly.

ARCO has been insulated from much of the problem so far because of earlier closings of stations and territorial consolidations; elimination of the archaic commission marketer system and the accounts that went with it; an extraordinarily successful sales effort to convince its dealers to be competitive, which is differential to the industry; the coupling of an ancillary business in some 20% of the lessee units and a lean cost structure that took several years to achieve. The recent refinery cutbacks from a system that had become bloated during the control years, eliminated some volume that would not be viable in today's market. Nevertheless, it would be folly to think these moves alone will provide enduring advantage or isolation from the ravages of a generally depressed market.

Well, what's to be done about this state of affairs? Withdrawal from the entire business or branded marketing are options; however, there are high profits to be made from a business that sells 120 billion units (gallons) per year and ARCO is among the strongest major company contenders at the moment. So these alternatives will not be pursued here.

To remain in the business, the majors must compete nearer to head-on with the independents or eventually be placed in an untenable position. As stated earlier, a niche will remain for the station catering to the customer unconcerned about price who wants service and/or credit. This market will settle out at no more than 20% so, in effect, the present two tier market will disappear. In its place will be one large, price competitive market and a smaller, neighborhood type specialized market. Some majors may, intentionally or by default, end up fighting for the "neighborhood niche." Most, however, must convert or gradually attrite.

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Can the majors --- or to be more specific, can ARCO compete with the independents? There are two obvious road-blocks immediately apparent. The credit card and the dealer apparatus.

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The credit card problem is relatively straightforward; namely, eliminate it. Competing for the price customer is just not possible while burdened with all the real costs of credit. There will be some mechanical problems, including the employee discount, but nothing appears insurmountable. What it will represent is an irrevocable abandonment of the higher-priced "major brand" notion as a workable concept. ARCO would be telling the motoring public it hears their call for economy. Quite an appealing campaign can be constructed around this theme.

The dealer apparatus is far more complex and difficult. Among other things, it could have political implications. The simple fact is only a portion (perhaps 50%) of today's dealers would be able to handle, or would want to work hard enough to handle the volume entailed in independent type operations. If ARCO dropped its price to the point where a dealer should be able to closely match the independents, many dealers would retain high pump prices and pocket the ARCO cuts. What is needed are means to motivate the dealer to the high-volume mode. The answer is twofold: (i) station rent, and (ii) a price that declines with volume. The volume discount pricing is already in place in the industry-wide rebate system that has arisen in the past year. The rent must be set at the level commensurate with the commercial value of the property which we call "economic rent."

With "economic rent" we become, to a degree, indifferent about the dealer's performance. If he fails to sell the volume potential, the station investment at least yields a commercial return. Although this cannot be endured permanently, corrections can be evolutionary in these circumstances. In most cases, though, the dealer will not be able to afford the rent unless volumes are increased.

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The trouble is that rent is an emotional and potentially political issue. Even though justified and even though we concurrently give the dealer the means to survive and prosper (i.e., a low price which should lead to higher sales), there will be a knee jerk reaction and a howl when rents are raised for some by factors of three and four. Furthermore, due to three-year leases, it takes that time to fully cycle an implementation and a phased approach to lessen the reaction would also have to cover a couple of years.

Let's say, for discussion, economic rent is implemented --- what happens to the 700-800 stations that dealers would leave? A search, requiring time, might find some capable replacements as dealers, but most would have to be closed permanently or become company operated. Closing might be bearable, but would clearly be less attractive than company operated. Here again, the risk of political interference arises, but the lower prices afforded to consumers by these company operated stations (at independent prices) should prevail over dealer resistance.

The mini-mart stations should prosper even more with independent pricing and, by and large, these operators can be expected to see the advantages of pricing to attract more volumes (and store customers).

So, what is the reward for ARCO if it takes on this not easily implemented strategy? There will be a discontinuity period where profits will be lower than would otherwise be the case if we hung onto what we have now. However, ARCO will be postured in the only stance having any hope in long-term viability. Lastly, depending on the degree and rapidity of competitive attrition, a lasting period of quite acceptable profitability could ensue.

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If the other majors do not conform, [illegible] to miss the boat, ARCO could end up a buyer of product from idle refining capacity of others for resale at a profit. The balance of power shift is, indeed, placing the marketer in control. Furthermore, if the majors lose the market and crude remains abundant, it is not inconceivable to have the marketers not only bargaining down refinery returns, but those of crude oil as well.

At this stage, the urge to hold on to the status quo seems attractive. Why not ride the current cash generation mode even if it goes into a declining trend? In other words, why lead the pack into a period of discontinuity before it is absolutely imperative -- because when the need for change is better perceived, it will be better received and, thus, easier to accomplish.

The answer boils down to a couple of key premises. First, that within a couple of years, an upheaval is inevitable and some of the present operators will not survive. Secondly, the relative strength of ARCO's refining and marketing will slip with the passage of time. Once other majors revamp their refineries and strengthen their marketing, their stake in the contest for survival will rise so the struggle will be more intense and the ARCO advantage will have decreased. Call it a pre-emptive strike or whatever, but the contention is that ARCO will be best served by moving sooner rather than later.

The best response would be for some players to cash out at the prospect of a discontinuity period. The worst response, which cannot be dismissed, is for other majors to [illegible] to concede ARCO's withdrawal from the major ranks with a price advantage. This could lead to a "blood-bath" price war period. The most likely response, which would be favorable on balance, would be early emulation by a couple of majors and moves by the rest later --- after we have established a clear edge. Attempts to place financial parameters on these possibilities must be covered in the January 26, 1982 SPU meeting.

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WITH THE LITIGATION ENTITLED CADI et al. v. ARCO et al.,
L.A.S.C. C423917

CONFIDENTI

For all the difficulties, not all of which have been covered here, it is being suggested that there is no really viable alternative to joining the independent marketer ranks, and the first convert should have it easier than those coming later.

The move to challenge the independent and move away from trying to walk both sides of the street will serve as a rallying point for an organization who's more perceptive members see it as treading water in a changing world.

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JSM (1/4/82)

CALIFORNIA DEALERS WITHOUT SUPPLY — HOW PMPA IS USED TO RESTRICT COMPETITION

California Service Station
and Garage Owners Association

July 1, 1987

Mr. Vic Rasheed
Service Station Dealers of America
304 Pennsylvania Ave., S. E.
Washington, D. C. 20003

RECEIVED JUL - 2 1987

RE: CONTINUING SUPPLY

Dear Vic:

In 1978 when Congress enacted the Petroleum Marketing Practices Act, their intentions and ours were to allow the major oil companies to leave the premises if they found it unprofitable. The reason that Congress allowed the encumbent dealer to buy the property, or in California the encumbent dealer to buy the improvements, was to allow the dealer to remain on the premises. We absolutely did not consider that the supplying company would not sell us gasoline. Not only are they not selling the dealers gasoline, they are prohibiting jobbers from selling the dealers gasoline as well.

In a meeting, Chevron quite clearly stated--where there are four service stations and each station pumps 60,000 gallons of gasoline per month (average Chevron station in California pumps 56,000 gallons now) that they plan to bulldoze three and funnel the remaining gallons to the fourth unit.

Chevron, Shell, and Arco have all announced that the only stations they are building in California will be company operated stations.

We have never asked for a subsidy, and we have never asked for a handout. We are simply stating to the major oil companies, okay, where we buy the land and improvements, you sell us gasoline.

Every major oil company in California that is operating company operated stations is selling gasoline at retail at or below the wholesale price they sell to their franchise dealers. If they do not knock out the 60,000 gallon service stations in the United States, they will not be able to raise the price of gasoline to consumers five years down the road. I realize the major oil companies can raise the wholesale price at anytime. Let me give you an example:

Chevron is leasing stations directly to franchise dealers for as much as $10,000 and $12,000 per month. On a 100,000 gallon station that is 10 cents per gallon. If a dealer purchases his improvements and repair facility just

4807 Clayton Road, Concord, California 94521 Telephone (415) 682-3102

down the street and he/she buys it for $300,000 (land and improvements) that is roughly 3 cents per gallon to purchase the property and improvements. (Loan payments of $1,000 per month for $100,000 for 30 years.) If the station down the street is a company operated station and the dealer is not eliminated, they will not be able to increase the retail price of gasoline. Move to Japan. In Japan gasoline is being sold at $3.20 per gallon, 57 cents of which is tax. The reason is they are able to get these kind of prices is that the major oil companies control it from the well head to the consumers' gasoline tank. In Canada gasoline is sold at approximately $2.50 per gallon. Again, the majors control from the well head to the consumers' gasoline tank. The retailers are on a sophisticated consignment plan in both countries.

Your approach of allowing the major oil companies to give us a list of jobbers that could sell product to us does not do the job completely, but it is one step forward. I have many jobbers who are personal friends. They simply will not sell gasoline to us now, even though they want to, because of the intense pressure from the major oil companies.

I think the legislation should take a two fold approach. We do not want Congress to require a major oil company to sell gasoline to us if it is not profitable. We are simply stating that at the end of a franchise arrangement, if the major oil company wants to exit the property, they can. Where it is not unprofitable they must continue to sell us gasoline. To stimulate competition, it would not hurt us in the least to have Congress enact legislation that says jobbers can sell gasoline to us.

Initially, Arco started refusing to supply dealers, but did sell them the property at favorable prices. We did not have a problem buying gasoline from other major oil companies because Arco closed stations that were pumping 100,000 gallons. Shell then began selling their properties to dealers, but refused to sell gasoline. Again, the problem was not too acute as other major oil companies picked up the slack.

Chevron is the largest remaining supplier of gasoline in California. In 1972 Chevron had 4,753 stations. At the end of 1985 they had 2,612. They closed 55 percent. They have acknowledged that they are closing another 25 percent but the indications we are getting is that they are going to close 50 percent more and end up with approximately 1,300 service stations.

We have had a number of dealers who have called ever major oil company in California, and the majors have collectively refused to supply, with the exception of Union Oil. Union Oil is willing to supply. Union is selling at wholesale, nine cents per gallon higher than the other majors.

While our prime concern is with the retailers, the consumers are really being disadvantaged as the competition is being eliminated.

I have attached a list of approximately 33 dealers who the major oil companies would not sell gasoline. Some of them have found other sources of supply. Some of them have simply closed their businesses.

Sincerely,

J Campbell

Jim Campbell, Executive Director
California Service Station and
Garage Owners Association

JC/rk

cc Jim Daskal
Peter Spinetta
Ralph Bombardiere

Enclosure

DEALERS IN CALIFORNIA WITH NO SUPPLY

Chevron dealer Larry Kuchenreuther
871 Francisco Blvd.
San Rafael, CA
(415) 453-3641

Chevron offered to sell dealer improvements for $81,000. Refused to sell product. Station bulldozed.

* * *

Van & Bob's Chevron
45 East Harding Way
Stockton, CA
(209) 462-1252

Chevron wanted to remove the tanks and pumps (they were two years old). Would not supply product. Dealer pumping approximately 45,000 gallons of gasoline per month. On a month to month lease.

* * *

Chevron dealer Roger Greenley
(415) 724-8535

Greenley pumping 60,000 to 70,000 gallons of gasoline per month. Chevron informed him that they were terminating the relationship and would not supply.

* * *

Chevron dealer Jim Derrington

Purchased gasoline from Chevron jobber, Joe Stocking, at 4 cents per gallon below Chevron's delivered price. Derrington was informed that his lease would be terminated if he continued to buy gasoline from Stocking. I talked to Joe Stocking, a Chevron distributor, and he told me that he was told by Chevron that he was not to deliver any more products to Jim Derrington or any other dealer. Also, Stocking was told not to sell gasoline to Dennis DeCota.

* * *

Chevron dealer Walt MaCore
530 San Ramon Valley
Danville, CA
(415) 837-8733

Pumping 60,000 gallons of gasoline per month. Large repair business. Chevron will not supply gasoline.

Chevron dealer Sharon Briggs
9540 Castillo Drive
San Simeon, CA 93452
(805) 927-4580

Only station left in San Simeon. Chevron has informed them they will not be supplied when their contract is up for renewal in 1988.

* * *

Chevron dealer Joe Cetwinski
(707) 257-0889

80,000 gallon per month dealer, $240,000 for improvements. Building 30 years old. Chevron will not supply.

* * *

Chevron dealers Don & Betty Fugate
69 Mitchell Blvd.
San Rafael, CA 94903
(415) 472-1790

Chevron will not supply.

* * *

Chevron dealers Bart Cox/Lee Poston
C & P Services, Inc. (2 stations)
177 California Drive
Burlingame, CA 94010

Chevron will not supply. This dealer agreed to pay approximately $550,000 for the land. Second location--4115 Coast Hwy., Pacifica, CA.

* * *

Chevron dealer Jim Arieta
Seventh & Lincoln Avenue
San Francisco, CA

Pumping 70,0000 gallons. See attached letter.

Chevron dealer Dennis DeCota
412 Redhill Ave., Suite 16
San Anselmo, CA 94960
(415) 457-4713

Chevron will not supply. Shell will not supply. Chevron told Stocking not to supply.

****

Siadat Enterprises, Inc. (Chevron)
1090 Saratoga
San Jose, CA
(408) 667-0839

Chevron will not supply. Chevron has escalated the land value approximately $3,000 above the appraised value to prevent a sale.

****

Chevron dealer George Dias
San Juan Baptista
(408) 623-4675

Dias is a 31 year Chevron dealer pumping approximately 60,000 gallons of gasoline per month. Station to be bulldozed. Chevron will not supply.

****

Chevron dealer Don Jackson
1200 Chester Avenue
Bakersfield, CA 93301
(805) 322-0008

Chevron selling improvements for $305,000. Will not supply gasoline.

****

Only 30 percent of rebuilt stations, maxi-marts, etc., are hitting Chevron's projections. Chevron dealers are trapped after being rebuilt, cannot make money, cannot sell service station.

Mobil dealer Richard Kwan
1495 Hay Street
San Leandro, CA
(415) 483-4318 or 483-4326

Richard Kwan averages 30,000 gallons of gasoline per month. Mobil will not supply.

* * *

Mobil dealer Mehdi Shadoori
5570 Stevens Creek Blvd.
Cupertino, CA 95014

Offer to sell property, would not sell gasoline.

* * *

Mobil dealer Ed Spitiri
3600 South El Camino Real
San Mateo, CA 94403

Mobil offered to sell the property to the existing dealer, but would not sell gasoline.

* * *

Mobil dealer Renato Keesler
2000 McHenry Avenue
Modesto, CA
(209) 529-9463

Mobil offered to sell him the land, but refused to sell gasoline. Now being supplied by Mobil jobber. As much as 11 cents per gallon difference in wholesale price.

* * *

Mobil dealer Dick Flaherty
625 Del Ganado
San Rafael, CA 94903
(415) 479-2662

Twenty nine years with Mobil. Twenty five thousand gallon service station. Sold property. Mobil would not supply. Was told by Bob Thielo, former Mobil representative now working for Redwood Oil Company, that Mobil would not allow Redwood Oil to supply the station branded.

Shell dealer R. D. Minto
College & Kent Avenue
Kentfield, CA 94904

Mr. Minto was pumping approximately 55,000 gallons of gasoline per month. He sold his rights to Dennis DeCota. Shell refused to supply product. Shell insisted on removing tanks, pumps, and canopy. Dennis DeCota is now being supplied by Mobil jobber. Major oil companies refused to supply.

****

Shell dealer Souren Sossikian
2901 San Bruno Avenue
San Bruno, CA
(415) 588-8180

Souren Sossikian was pumping 50,000 to 60,000 gallons of gasoline per month. Shell would not supply.

****

Shell dealers Jim and Krestine Jordan
5725 Thornhill Drive
Oakland, CA
(415) 339-2486

Shell refussed to supply product. They were able to renew the underlying lease.

****

Shell dealer Roberto Lazatin
407 South Deleware
San Mateo, CA 94402
(415) 571-7309

Pumping 80,000 gallons of gasoline per month. Shell refused to sell him product. Property owner would have leased to dealer if Shell would have supplied.

****

Shell dealers Bob & Tina Smith
(415) 834-2158

Shell will not supply.

Union dealer Jerry Hulsey
3200 "F" Street
Bakersfield, CA 93301

Jerry was a Union Oil dealer pumping 30,000 to 40,000 gallons of gasoline per month. At the end of the lease period, Union sold him the property for $175,000. Jerry could not find one major oil company in Bakersfield to supply him.

* * *

Union dealer Tony Wong
2252 Telegraph Avenue
Oakland, CA 94512
(415) 451-5662

Union would not renew his underlying lease. Mr. Wong was able to negotiate lease with property owner. Mr. Wong was pumping approximately 50,000 gallons of gasoline per month. Union refused to supply.

* * *

Union dealer Richard S. Ownbey
1849 Fulton Avenue
Sacramento, CA

Offered to sell him the improvements for $293,000. Refused to sell him gasoline.

* * *

Union dealers Randy & Cathy Chester
(916) 583-4985 or (916) 583-2652--station

Operating Union station in Tahoe City. Union withdrew from the station. Would not sell product to dealer or to existing owner.

Arco dealer Sui-Sun Ngai
600 Portola Drive
San Francisco, CA 94127
(415) 665-0505 or 647-7620

Arco will sell dealer property, but will not supply product. Ngai is pumping approximately 86,000 gallons of gasoline per month.

* * *

Arco dealer Martin Byrd
3055 "35th" Avenue
Oakland, CA 94619
(415) 436-9720

Byrd is pumping approximately 90,000 gallons of gasoline per month. Arco sold him the land and improvements, but will not supply product.

* * *

Arco dealer Kambiz Mesbay
2990 San Bruno Avenue
San Francisco, CA
(415) 467-7220

Mesbay pumping 80,000 gallons of gasoline per month. Arco refused to supply.

* * *

Arco dealer Marshal Romeo
505 West Napa Street
Sonoma, CA
(707) 996-0406

Romeo pumps 90,000 gallons of gasoline per month. Arco would not renew the lease with the property owner. Arco refused to supply dealer if he did lease the improvements, which he did.

* * *

Exxon dealer Bud Adams
Hesperian & Depot
Hayward, CA

Unit pumping 50,000 gallons of gasoline per month. Bulldozed facility. Would not supply gasoline.

RECEIVED

JUN 16 1987

Chevron

Chevron U.S.A. Inc.
575 Market Street, San Francisco, California
Mail Address: P.O. Box 7006, San Francisco, CA 94120 7006

J. D. Garber
General Manager, Retail Division
Marketing Department

June 9, 1987

Mr. James Arieta
Station #9-0294
1200 Seventh Avenue
San Francisco, CA 94122

Dear Mr. Arieta:

Thank you for your letter to Mr. Keller, which has been referred to me since Chevron U.S.A. Inc. retail marketing matters are my responsibility.

Your association with Chevron as a dealer and as a stockholder, is a business relationship which Chevron certainly respects and appreciates.

After receipt of your letter, we once again reviewed our position, and after careful reconsideration we still feel that our decision to dispose of Station #9-0294 at the end of your current lease is a prudent one. Our reasons are based primarily on our analysis with respect to the current value of the property; the simple fact is that this property has appreciated in value to a level that it will no longer support a service station operation. We are convinced that our decision is a correct one, which will best serve the interests of all Chevron stockholders.

We appreciate our longstanding relationship, and we wish you every success in the future. If you have any further questions, feel free to contact our West Central Division Marketing Manager, Mr. W. J. Berghoff.

Sincerely,

J. D. Garber

dl

cc: Mr. W. J. Bergboff

[illegible] Region

Union Oil Company of California
76 Broadway, Sacramento, California 95818
Telephone (916) 446-4981

union 76

January 30, 1985

Mr. Richard S. Ownbey
1849 Fulton Avenue
Sacramento, California 95825

UNION OIL SERVICE STATION NO. 6182
SACRAMENTO, CALIFORNIA

NOTICE OF NON-RENEWAL

Dear Mr. Ownbey:

You are hereby notified that that certain Service Station Lease dated June 24, 1982 and that certain Retail Dealer Motor Fuel Purchase Contract dated June 24, 1982 are hereby non-renewed effective July 18, 1985 for the reason that Union has, pursuant to Paragraph 10 (e) (4) made a good faith determination in a normal course of business to (iii) sell the station. The non-renewal is effective July 18, 1985.

Consistent with your rights pursuant to the Petroleum Marketing Practices Act, Union hereby offers to sell you above-mentioned property and facilities for a purchase price of $293,000.00. This offer will remain open until March 29, 1985. The offer must be exercised within this period by you in writing to Union Oil Company of California, P. O. Box 3813, San Francisco, California 94119, Attention: Manager of Real Estate.

//If you choose to purchase the property and improvements, Union will no longer supply you with petroleum products and it will be necessary for you to obtain another supplier.

This offer is made solely to you. The offer can only be exercised by you and is not assignable or otherwise transferable. If written notice of your exercise of this option is not received by March 29, 1985, this offer will become null and void.

In the event you do not elect to purchase the service station, you must vacate the premises on or before July 18, 1985.

You are reminded that until you deliver possession of the station as set forth above, you are to keep at the service station all the personal property covered by that certain Security Agreement between us dated June 10, 1981. DO NOT SELL OR REMOVE THAT PERSONAL PROPERTY FROM THE SERVICE STATION unless

Chevron

Chevron U.S.A. Inc.
2 Annabel Lane, Suite 200, San Ramon, CA 94583 • Phone (415) 838-5000

Marketing Department

April 3, 1987

PERSONALLY DELIVERED

Mr. Don Fugate
69 Mitchell Boulevard
San Rafael, California 94903

Re: Proposed Sale of Service Station
Improvements, S.S. No. B029-7021
Mitchell Boulevard and Pool Street
San Rafael, California

Dear Mr. Fugate:

This letter will confirm your oral request to purchase from Chevron the service station improvements located at 69 Mitchell Boulevard, San Rafael, California.

You currently occupy the subject premises pursuant to a Dealer Lease dated March 16, 1984, which expires June 30, 1987. We have notified you that the Dealer Lease will not be renewed.

As previously orally advised, Chevron offers to sell you the subject improvements, excluding underground storage tanks, lines, and appurtenances, for the sum of $140,683. The sale will be on an all-cash basis, must be completed on or before May 30, 1987, and will be on the terms set out in the enclosed Purchase and Sale Agreement.

Please note that Chevron will remove all underground storage tanks, lines, and appurtenances, and will complete certain environmental inspections, and if necessary, cleanup, and you are required to cooperate in this regard.

As you know your current Dealer Supply Contract expires June 30, 1987. Chevron will not enter into a new Supply Contract with you.

If you wish to purchase the subject improvements as outlined please sign the enclosed copy of this letter and return to the undersigned immediately.

The Purchase and Sale Agreement must be signed in duplicate and returned to the undersigned no later than May 15, 1987. If it is not so signed and returned our offer is withdrawn. If you elect not to accept our offer or, if for any reason, the purchase and sale transaction is not completed on or before May 30, 1987, you will be expected to vacate the premises on June 30, 1987.

Should you have any questions about the foregoing please call D. R. Crispen at (415) 838-5259.

Very truly yours,

CHEVRON U.S.A. INC.

By R. Mooney

Enclosure

Agreed:

______________________ Dated: ______________________
Don Fugate

Mobil Oil Corporation

1465 ENEA CIRCLE, SUITE 919
P O BOX 4002
CONCORD, CALIFORNIA 94524-7002
TELEPHONE (415) 674-4450

March 19, 1987

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Edgar A. Spiteri
3600 S. El Camino Real
San Mateo, CA 94403

NOTIFICATION OF NON-RENEWAL
SERVICE STATION NO: 10-FVW

Dear Mr. Spiteri:

Please take notice that Mobil Oil Corporation intends and hereby does non-renew and terminate the franchise relationship and agreements between us effective the 31st day of August, 1987.

The reason for this non-renewal is as follows:

> Mobil has determined, in good faith and in the normal course of business, to sell the premises.

Within the next 90 days, Mobil will be in contact with you concerning your rights pursuant to Federal law with respect to the purchase of the premises. However, please understand that Mobil will not continue to supply motor fuels to this location after the expiration of your current agreement.

A copy of the Summary Statement of the Petroleum Marketing Practices Act, prepared by the Department of Energy, is attached.

Please arrange for the surrender and return of all Mobil property to us on or before the termination date.

Very truly yours,

MOBIL OIL CORPORATION

J. A. Edwards
District Sales Manager

RECEIVED

MAR 2 7 1987

MTE:ds
Attachment
cc: T. L. Bardet
J. B. Wright
M. J. Scandalios
T. J. Mierkey

0169/1109A

Mobil P.O. BOX [illegible]
CONCORD, CALIFORNIA 94524

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

29 MAR
1985

Mobil Oil Corporation

1465 ENEA CIRCLE, SUITE 819
P.O. BOX [illegible]
CONCORD, CALIFORNIA 94524
TELEPHONE (415) 680 0010

March 27, 1985

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Donald R. Keesler
2000 McHenry Ave.
Modesto, CA. 95350

NOTIFICATION OF NON-RENEWAL
SERVICE STATION NO: 10-969

Dear Mr. Keesler:

Please take notice that Mobil Oil Corporation intends and hereby does non-renew and terminate the franchise relationship and agreements between us effective the 31st day of October, 1985.

The reason for this non-renewal is as follows:

> Mobil has determined, in good faith and in the normal course of business, to sell the premises.

Within the next 90 days, Mobil will be in contact with you concerning your rights pursuant to Federal law with respect to the purchase of the premises. However, please understand that Mobil will not continue to supply motor fuels to this location after the expiration of your current agreement.

A copy of the Summary Statement of the Petroleum Marketing Practices Act, prepared by the Department of Energy, is attached.

Please arrange for the surrender and return of all Mobil property to us on or before the termination date.

Very truly yours,

MOBIL OIL CORPORATION

A. Edwards
District Sales Manager

JBC:c
Attachment

0048/2786A

Union Oil Company of California
76 Broadway, Sacramento, California 95818
Telephone (916) 446-4981

UNION 76

January 30, 1985

Mr. Richard S. Ownbey
1849 Fulton Avenue
Sacramento, California 95825

UNION OIL SERVICE STATION NO. 6182
SACRAMENTO, CALIFORNIA

NOTICE OF NON-RENEWAL

Dear Mr. Ownbey:

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Consistent with your rights pursuant to the Petroleum Marketing Practices Act, Union hereby offers to sell you above-mentioned property and facilities for a purchase price of $293,000.00. This offer will remain open until March 29, 1985. The offer must be exercised within this period by you in writing to Union Oil Company of California, P. O. Box 3813, San Francisco, California 94119, Attention: Manager of Real Estate.

If you choose to purchase the property and improvements, Union will no longer supply you with petroleum products and it will be necessary for you to obtain another supplier.

This offer is made solely to you. The offer can only be exercised by you and is not assignable or otherwise transferable. If written notice of your exercise of this option is not received by March 29, 1985, this offer will become null and void.

In the event you do not elect to purchase the service station, you must vacate the premises on or before July 18, 1985.

You are reminded that until you deliver possession of the station as set forth above, you are to keep at the service station all the personal property covered by that certain Security Agreement between us dated June 10, 1981. DO NOT SELL OR REMOVE THAT PERSONAL PROPERTY FROM THE SERVICE STATION unless we give you written consent to do so; provided, however, that the personal property that is resale merchandise may be sold in the normal service station operation.

Attached hereto is a copy of the Summary of Title 1 of the Petroleum Practices Act prepared by the Office of the Secretary of Energy and published August 30, 1978, in Volume 43, No. 169 of the Federal Register.

Very truly yours,

Area Manager Retail

RFF/LM:jan
Attachments

RECEIVED:
Richard S. Ownbey
Richard S. Ownbey

DATE 2/4/85

CASE LAW -- WHY PMPA IS NOT WORKING

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

September 30, 1987

TO:
Joel Weisberg, Esq.*
John A. Guernsey, Esq.
Dimitri G. Daskal, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case No. 86-5102 and copies are enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. Rehearing In Banc.

Rehearing in banc is not favored and ordinarily will not be ordered except

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) where the proceeding involves a question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

Nor, except in rare cases, has the court granted rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

O-J

SA Direct Dial 597-3135
*bill of costs form attached

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5102

SLATKY, JOHN,

Appellant

v.

AMOCO OIL COMPANY,

Appellee

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 85-1122)

Argued August 20, 1986

Before: BECKER, MANSMANN, Circuit Judges
and TEITELBAUM, District Judge*

Reargued In Banc May 4, 1987

Before: GIBBONS, SEITZ, WEIS, HIGGINBOTHAM
SLOVITER, BECKER, STAPLETON
and MANSMANN, Circuit Judges

(Filed SEP 30 1987)

JOEL WEISBERG (Argued)
410 North Second Street
Harrisburg, PA 17108

Attorney for Appellant

---

* Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation.

procedural direction to the courts about how to judge whether the distributor has abided by the substantive restrictions and failed to renew only because of one of the statutorily permissible reasons. Thus, what the court decides in a challenge to a nonrenewal decision is not whether the distributor determined not to renew according to some elusive notion of good faith but whether it sincerely made a decision to sell the property or to alter it or to accomplish some other business purpose permitted under the statute. See Senate Report at 37 ("good faith test is meant to preclude sham determinations").

Amoco's suggestion that the statute only requires a distributor to determine an offer price in "good faith" takes this procedural standard of judicial scrutiny and turns it into a substantive restriction on the distributor's behavior. But a mere requirement to make an offer "in good faith" is essentially without content. Failing to suggest what a distributor must sincerely decide, it suggests only some kind of floating goodwill. Because it is so ephemeral, a franchisee would virtually never be able to show its absence. Even if we were to accept Amoco's analogy between the offer price decision and a decision not to renew a franchise, we would therefore adopt the "good faith" standard only as a standard of judicial scrutiny. In order to decide whether the distributor had made the offer price in good faith, we would still have to decide what kind of offer price the statute requires.

B.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DAVID P. VALENTINE, Plaintiff/ Counterdefendant,	No. CIV 83-1651 PHX-EHC
v.	
MOBIL OIL CORPORATION, a New York corporation, Defendant/ Counterclaimant.	ORDER

On August 22, 1933, Plaintiff David P. Valentine (Valentine) commenced this action seeking a prohibitory and mandatory injunction against Defendant Mobil Oil Corporation (Mobil). Valentine seeks a preliminary injunction against Mobil enjoining it from nonrenewing or terminating Valentine's franchise, (including service station facilities leased from Mobil) and from commencing demolition of the service station facilities. He also seeks a declaratory judgment that the terms of a Redevelopment Rider (rider) attached to Mobil's 1983 renewal agreement is a provision which materially alters the leased premises thereby requiring Mobil to make a bona fide offer to Valentine for him permissible under subjective good faith standard without regard to reasonableness of increase); Bellmore v. Mobil Oil Corp., 524 F.Supp. 850 (D.Conn. 1981); see, e.g., Roberts v. Amoco Oil Co., No. 83-2329, slip op at 8 for cases cited therein. Contra, Tiller v. Amerada Hess Corp., 540 F.Supp. 160 (D.S.C. 1981).

> In essence, then, the legislative history suggests that courts have been directed to look to the franchisor's intent rather than to the effect of its actions. If it is only using proposed changes to the lease to disguise an illegal attempt to discriminate against the franchisee and thereby drive him from business, the court is empowered to interfere. If, on the other hand, a good faith application of a rental formula operates unreasonably in a particular case, the dictates of the marketplace alone will govern the transaction. This interpretation is completely in accord with the perceived ~~abuse which~~ Congress sought to rectify.

Munno v. Amoco Oil Co., 488 F.Supp. at 1119.

The result here might have been different if the Court were permitted to evaluate the good faith test on the basis of objective reasonableness. Legislative intent precludes such consideration.

Here, Mobil's actions clearly coincide with practices contemplated and accepted in the legislative history, which this Court has reviewed independent of the court's conclusions in Baldauf and Munno. Mobil maintains that its rider is incorporated in all of its new and renewed lease packages. There is no showing that Valentine was treated differently from other dealers. Mobil alleges that the changes and alterations proposed in the rider allow it to "keep pace" with the competition, and provides it with adequate flexibility to adapt to changing market

As arguably onerous as these results are to Valentine, Mobil has satisfied the test required by the PMPA given it acted for legitimate business reasons. Any alterations or changes in the terms of renewal were not done as a pretext for nonrenewal. There is nothing in the record from which it can be reasonably inferred otherwise. In the final analysis, Valentine and similarly situated franchisees must seek from Congress any different balancing of the equities between franchisors and franchisees under the PMPA.

Accordingly,

IT IS ORDERED that Defendant's Motion for Summary Judgment is granted as to Counts I and IV of the amended complaint and as to the counterclaim.

Dated this 6th day of November, 1984.

Earl H Carroll

United States District Judge

Senator **Ford**. Thank you Mr Probus.

Mr. Kane—and pull that fairly close to you, it is a little hard to hear.

STATEMENT OF JACK KANE, CHERRY HILL, NJ

Mr. **Kane**. Good morning, Mr. Chairman. My name is Jack Kane, I live in Cherry Hill, New Jersey, and I have worked in automotive repairs and gasoline service stations for most of my adult life. For the past 36 years, starting at the age of 16 or 17 I have worked at this job, except for the four years that I served in the United States Air Force. I have been involved in repair of automobiles and other motor vehicles and the sale and distribution of automotive products. It is and has been the sole source of support for myself, my wife and my three sons who are now adults.

My relationship with Mobil Oil Company began in November 1972 when I entered into a franchise lease for the operation of a service station owned by Mobil, located in Eastham Township, New Jersey. In all the 16 years I have operated as a franchisee of Mobil I have never been accused of shortchanging a customer, not maintaining my station in the appropriate manner, and I have never failed to pay any rents or monies due to Mobil in a timely fashion; I have received only compliments from marketing representatives and other representatives of Mobil Oil Company.

My relationship with my franchisor over the years has been of an exemplary nature both for myself as well as for my franchisor. During this long period of 16 years I have been able to build the reputation of Mobil as well as myself, in providing exemplary service at a fair price.

My story of horror, as it has impacted on me and my family and my ability to earn a livelihood began in August of 1985. In August of 1985 I received a notification from Mobil that they would require, in order to renew my lease and as a condition of renewal, that I agree to maintain my station open for 24 hours a day, 7 days a week. This was supposed to be effective December 1, 1985.

This 24-hour, 7 day-a-week requirement was placed in my prospective lease ostensibly on the basis of a study that Mobil had done indicating volume of traffic and other relevant factors, which were told to me by my marketing representatives of Mobil. I have attempted negotiation. There was none. I received on April 29, 1985 a notice of termination. Said notice of termination was founded upon the reluctance that I had displayed in my operation of a 24-hour pumper.

My attorney as early as September of 1985 attempted to negotiate further with Mobil. At that, and towards the end of September 1985, September 25th, I received notification from an attorney from Mobil, a Mr. William Snead, that Mobil Oil Corporation had made a determination in good faith and in the normal course of business that the proper hours of operation for my service station was 24 hours and therefore Mobil was not prepared to make any adjustments thereto.

On August 29, 1985 I received a notice of nonrenewal from my franchisee. There is evidence that representatives of Mobil have advised competitors that they cannot push Jack Kane out of business so they can install a pumper station and get rid of the old-fashioned man and his ways of offering service to his clients and customers.

Mobil has made it very clear they are only interested in one thing: the pumping of gas and the selling of oil. They do not care about the franchisee who has built his reputation and the reputation of Mobil on hard work and good service.

It is my understanding that the Petroleum Marketing Practicing Act was enacted in order to protect the people like myself, franchisees, from arbitrary discrimination, determination or nonrenewal of their franchise specifically, and I understood that the franchisee's independence is undermined by the use of actual or threatened termination or nonrenewal to comply with franchisor marketing policies.

The gross disparity of bargaining power surely exists between my ability to pay for all my attorney's time and the ability of a large corporation like Mobil to terminate. The Court has already said that the only standard that must be used is subjective good-faith business decision. Mobil need not show any subjective good-faith decision. All they do is say, we have made the decision and therefore you must abide by same.

The Court has even refused to consider as an issue of economic impact of 24-hour operation upon myself, the franchisee. The court is not willing to listen to the proofs that we have to offer that in our area of New Jersey there are just no employees willing to work at any reasonable rate of pay during the hours of 12 midnight to 6:00 a.m.

Notwithstanding all the above problems, I have been able to maintain my service station since November of 1987 on a 24-hour basis with a few exceptions. These exceptions have been pounced upon by Mobil to show that I have not made a good-faith effort to fulfill my obligation.

Gentlemen, I assure you that I have made a superhuman effort to keep my station open 24-hours a day, 7 days a week. There are just no employees out there to be had, unless I am willing to pay $10 or $15 an hour, and who would be willing to work these hours, stand out in the cold and freeze and be wet?

May I relate to you my experience of my situation? I had to hire an employee who just came in. I was unable to check his reference. The next morning he left with over $300 of cash register receipts, and now I cannot locate him nor recover the money.

My station is located in a rather suburban area, some even call it semi-rural. The police force has been unable to check each of our stations on a consistent basis. My employees who are out there work in fear of their life, and I work in fear that something will happen to them. Mobil will listen to none of these issues, and the courts have refused to listen to these issues.

I have made every effort to engage employees. I have spent numerous dollars in trying to perform pursuant to the franchisor's requirement. I have spared no expense nor effort in trying to keep my station and maintain the station in a clean, respectable, honest and honorable manner, all to no avail. Mobil just wants Jack Kane out, and they will grab at every straw and every opportunity to indicate same.

It is therefore that I come before you and ask you to clearly set aside the law that the courts will note that it is the determination of this body and the consideration of the franchisees' position as required by the Petroleum Marketing Practices Act, and that it is not only the franchisor who can walk roughshod over the small man.

Unless there is enacted some indication that it is the intent of this body that the franchisees' position be considered, the courts of this country consistently, I am so informed by my lawyers that I have, that the franchisor can do as it wishes just as long as they have made the decision in good faith and it is a business decision.

All that I know is that I have made a business decision in trying to make a living. I cannot make a living if there is consistently a drain on my assets by requiring me to lose money each and every night. I cannot continue to make a living by being required to be present from 12 midnight to 6:00 a.m. and then to repair automobiles, sell gasoline and serve as a troubleshooter for my customers during the day.

I cannot continue to operate as a fair and reasonable service station when I lose money when the intent of the franchisee was to be a two-way street: a source of money for the franchisor and a source of money to me, the working man and the working woman of this country.

Thank you, gentlemen, for permitting me to tell you my story. To this time I thought I was protected by the statute which you enacted, and that I was not to be held responsible for failure to operate my station when it was caused by factors beyond my control. It is beyond my control when I cannot find employees. It is beyond my control when economics do not permit me to pay for employees who might be willing to risk their life at a high enough price to work between 12 midnight and 6:00 a.m.

I want to thank you for listening to me, and I would be willing to answer any questions you might have. Hopefully, I will be of some assistance.

[The prepared statement of Mr. Kane follows:]

STATEMENT OF JACK KANE BEFORE THE SENATE COMMITTEE ON THE PETROLEUM MARKETING PACTICES ACT, TUESDAY, OCOTOBER 4, 1988.

My name is Jack Kane and I live in Cherry Hill, New Jersey and have worked in automotive repairs and at gasoline service stations for most of my adult life. For the past 36 years, starting at age 16 or 17, I have worked at this job except for the four years that I served the United States in the Air Force. I have been involved in the repair of automobiles and other motor vehicles and the sale and distribution of automotive products. It is and has been the sole source of support for myself, my wife and three sons who are now adults.

My relationship with the Mobil Oil Company began November 1972 when I entered into a franchise lease for the operation of a station owned by Mobil located in Evesham Township, New Jersey. In all of the sixteen years that I have operated as a franchisee of Mobil, I have never been accused of short changing a customer, not maintaining my station in an appropriate manner, I have never failed to pay any rents or monies due Mobil in a timely fashion and have received only compliments from the Marketing Representatives and other representatives of Mobil Oil Company. My relationship with my franchisor over the years has been of an exemplary nature, both for myself as well as for the franchisor. During this long period of sixteen years, I have been able to build the reputation of Mobil as well as myself in providing exemplary service at a fair price.

My story of horror as it is impacted upon myself and my family and my ability to earn a livelihood began in August of 1985. Prior to that time and early in our franchise relationship in 1970's my regular hours of operation were from 7:00 a.m. in the morning to 10:00 p.m. in the evening, six days a week. Following my second Lease with Mobil, I voluntarily opened my station on Sundays recognizing the business necessity. This was not required by the franchisor but had been requested and I believe that this was a legitimate request in light of the realities of the market place. My Sunday operation hours at that time were in the winter time, 8:00 a.m. to 6:00 p.m. and during the summer hours, recognizing people travelling later at night, I remained open until 10:00 p.m. This was satisfactory to both the franchisor as well as myself. I was able to man my station although it required super human effort on my part to be able to fill in for those employees who were no shows at different times. I was fortunate to have my sons who were able to assist me even without pay in serving our customers. My franchise lease entered into in 1979, which covered a period from December 1, 1979 to November 30, 1982, my requirements for operation were from 7:00 a.m. to 10:00 p.m. on weekdays and from 9:00 a.m. to 9:00 p.m. on Sundays. Notwithstanding this requirement, I was consistently opened on Sundays from 7:00 a.m. and maintained my station even in later hours on the Sundays. In August of 1985, I received notification from Mobil that they would require, in order to renew my lease and as condition of renewal, that I agree to maintain my station open twenty-four hours a day, seven days per week and this was to become effective December 1, 1985.

This twenty-four hour, seven days a week requirement was placed in my prospective lease, ostensibly on the basis of a study that Mobil had done indicating volume of traffic and other relevant factors which were told to me by the Marketing Representative of Mobil, by one John Litella and Mr. Len Rinehart, the territory manager for Mobil. It was at that time that my attorney, Jeffrey Keiser, attempted to explain to Mobil by letter to its District Manager that Jack's Mobil was and always has been primarily a "service station". Its major thrust was repair and custom oriented and although Route 70 might be considered a major highway, Jack's Mobil always serviced residents and developed a fiercely loyal clientele. Due to this excellent reputation for service and repair, I was able to increase the sale of Mobil products market and my customers were even willing to pay a few cents per gallon more than prices of competitors along the same roadway. We attempted at that time to further explain that keeping open twenty-four hours would not make my station competitive based upon the price differential and the nature of the clientele that I had built up versus the nature of a "gas and go operation". Notwithstanding my attempted negotiation, I received on April 29, 1985 a notice of termination. Said notice of termination was founded upon the reluctance that I had displayed to changing my operation to a twenty-four hour "pumper". My attorney, as early as September 1985, attempted to negotiate further with Mobil. At that and towards the end of September 25, 1985, I received notification from the attorney for Mobil, a Mr. William G. Sneed, that Mobil Oil Corporation made a determination in good faith and in the normal course of business that the proper hours of operation for my service station was for twenty-four hours and therefore Mobil was not prepared to make any adjustments thereto. On August 29, 1985, I received notice of non-renewal of my franchise. On November 11, 1985, we received a letter again from the attorney for Mobil Corporation, one William Sneed, that the determination of twenty-four hours was made on the basis of an analysis of the service station location, which included traffic counts, profitability calculations, and consideration of competitors hours and operations.. None of these factors were ever shown to me by the Marketing Representatives of Mobil nor could they in fact have been shown. The roadway on which my station has operated for these sixteen years, although considered a major thoroughfare for the Township of Cherry Hill, Marlton and Evesham, is primarily a commuter route and that traffic on this route is almost non-existent after dark and especially after 9:00 p.m. or 10:00 p.m. My attorney asked that Mobil, as other franchisors, share the cost or subsidize me for any nighttime operations. Said was rejected out of hand during this negotiation for the new contract. The letter to me, which I would like to offer a copy to you, specifically sets out Mobil's reasons for refusal to negotiate the twenty-four hour requirement. It is their interpretation that there are no objective standards of reasonable and material, but rather that Mobil act only with subjective good faith and that the ultimate objective reasonableness of the requirements of the franchisor are not open to scrutiny by the Courts.

On November 20, 1985, all during this period of negotiating, the renewal of a franchise agreement for the period of December 1, 1985 to November 30, 1988, my attorney and I tried to advise Mobil, through Mr. Latella, as well as William Sneed, attorney for Mobil and others of the Mobil hierarchy that I had made every good faith to operate my station in accordance with the hours set forth in any and all leases and that compliance was always a good faith effort to maintain my station within the hours and within my ability to have responsible employees available. We had a face to face meeting, requested documentation and indication to show that there would be increase profitability and ability to man the station for twenty-four hours. While we had a meeting, the only subject was my willingness to attempt to operate my station on a twenty-four hour basis, notwithstanding all of my misgivings and fears that such an operation could not be either profitably operated or even meet its minimal costs but would operate at a lost and only my lost and my detriment that Mobil exceed to renewing the franchise agreement. I specifically pointed out that my competitors were suffering severe losses during the 12:00 a.m. to 6:00 a.m. period of time.

Further, I would like to point out to this Honorable Committee that it was during this negotiation period of September through November of 1985 that my attorney and I pointed out, both in writing and orally, many times that I was advertising in the local newspapers and had a sign in my window looking for help in order to make available my station to be open from 12:00 midnight to 6:00 a.m. We further pointed out the security concern as a real concern for both myself, my employees and the local township. Mobil never addressed itself to the issues of expense, operation, the finding of good employees nor the need for safety. I specifically pointed out that some of my competitors had a bullet proof kiosk to protect their employees. I had only a small service station which opened into my bays where all of the expensive tools and equipment, which I used for repair of automotive vehicles were kept. I had no way of securing said value material nor cars that were left for my care without having a trustworthy employee present.

Recognizing my long years of experience and the lack of any complaints, neither by customers nor by representatives of Mobil, that Mobil finally agreed to permit me to continue even against my own best interest the franchise operation under an agreement dated November 30, 1985 to November 30, 1988. This recognition of my past work earned me a letter of probation warning me that non-compliance with the hours imposed upon me and in a contract forced upon me and without considering my position by my franchisor. Immediately thereafter from December 1, 1985 through the time that an Ordinance was passed in Evesham Township, the location of my station, on January 23, 1986, my station operated twenty four hours a day requiring that I and my sons fill in, stay open all night, work during the day, come back again to fill in the night hours when we could not find employees. At all times during this period, I opened twenty-four hours and in fact remained open into February of 1986, not knowing that the Ordinance was in effect. In or about March of 1986, I received a letter from Mobil advising me that I only need keep open my station pursuant to my prior hours. This was my understanding and I reverted to my prior hours with the exception that I started my day at 6:00 a.m. I was unaware of the requirement that my station be opened from 6:00 a.m. to 12:00 midnight. Upon notification in February of 1987, I immediately changed my station to a regular 6:00 a.m. to 12:00 midnight operation, seven days a week. On April 1, 1987, approximately one year later, I was advised that the Superior Court of New Jersey had set aside the local Evesham Township Ordinance and thereafter was specifically told by the representatives of Mobil not to do anything until I hear from them. While it is true that I was advised by one Jack Hooven, the marketing representative of Mobil that I would be required to re-open in twenty-four hours, I was advised not to do anything about reopening within those hours until I received additional notification. In June of 1987, I received a letter of notification requiring me to be opened twenty-four hours. I immediately thereafter spoke to a representative of Mobil whom I cannot identify but know that it was a female and was told that I was not to worry about the letter that it had been sent to me in error and that I could go on my vacation in July of 1987 without worrying about the hours of operation and I established the procedure whereby there would be coverage at the station at all times for 6:00 a.m. to 12:00 midnight.

During the month of July of 1987, my station was closed due to the work of Mobil in digging up the station and replacing of tanks. For substantially the entire month, we were unable to sell gasoline whether it be at night or during the day as our station and islands were closed. The only work that we did do during that month was repairs to automobiles in our automobile service shop. On or about the middle of August, I was visited by Robert Owens and Len Rinehart, who advised me that I had two weeks to open my station on a twenty-four hour basis. I expressed to the gentlemen who were both the Territory and District Managers that I must rely upon students who were then preparing to go back to school and that I did not have the necessary personnel to operate the station. I asked specifically for assistance in this matter and was advised by Mobil, "that your problem not ours."

In late September 1987, Mobil advised me that I must open my station for twenty-four hours whereupon my attorney, by letter dated September 30, 1987, pleaded with Moibl for assistance from his franchisor, Mobil in providing some means of security for my employees. It was further pointed out that during the period time that I had remained open for twenty-four hours during December of 1985, January and February of 1986, that there was not one single night wherein expenses were met. It was further requested that some assistance be offered in procuring personnel or employees in a market that had fast dried up. None of these requests were responded to by Mobil except with the warnings after all these years of hard work and effort on behalf of Mobil that unless the station was opened twenty-four hours without assistance of Mobil in any fashion whatsoever, that they were going to terminate my lease.

Not knowing what to do, my attorney filed under the New Jersey Franchise Practices Act, a complaint and there was entered an injunction to prevent Mobil from closing down my station. I do not understand all the ramifications of the legal system, however, I am advised that Mobil then had this matter removed to the Federal District Court, and although there was no termination of my franchise agreement, the Federal Court accepted jurisdiction in this matter and would not permit the matter to be returned to the State Court where state law would be applicable. After long maneuvering and all kinds of legal work that was done by my attorneys as well as the attorneys for Mobil, I was informed that an injunction had finally be entered by the Federal Court and that this matter would be tried in the coming months. During this period of time, I have been required to hire attorneys familiar with these laws and who have advised me that they have met the opposition of courts who judge good faith merely by the statement of Mobil that they are acting under a subjective business judgment. I, in fact, was present at a hearing where my attorney had to argue that in fact Mobil was not operating with good faith and fair dealing but had chosen my station and myself to put us out of business. I have made offers to Mobil to permit me to sell my station to others and they have consistently refused to do so. There is evidence that representatives of Mobil have advised competitors that they can't wait to push Jack Kane out of business so that they can install a "pumper station and get rid of the old fashion man and his ways of offering ~~service t~~o clients." Mobil has made it very clear that they are only interested in one thing, the pumping of gas and the selling of oil. They do not care about the franchisee who has built his reputation and the reputation of Mobil on hard work and good service.

It is my understanding that the Petroleum Marketing Practices Act was enacted in order to protect people like myself, franchisees, from arbitrary discriminatory termination or non-renewal of their franchise. Specifically, I understood that the franchisee's independence is undermined by the use of actual or threaten termination or non-renewal to compel compliance with franchisor marketing policies; that gross disparity of bargaining power surely exist between my ability to pay for all my attorney's time and the ability of a large corporation like Mobil to terminate. The Court has already said that the only standards that must be used is subjective good faith business decision. Mobil need not show any subjective good faith decision. All they do is say, we have made the decision and therefore you must abide by same. The Court has refused to even consider as an issue the economic impact of a twenty-four hour operation upon myself, the franchisee. The Court is willing to listen to the proofs that we have to offer that in our area of New Jersey there just are no employees willing to work at any reasonable rate of pay during the hours of 12:00 midnight and 6:00 a.m.

Notwithstanding all of the above problems, I have been able to man my station since November of 1987 on a twenty-four hour basis with few exceptions. These exceptions have been pounced upon by Mobil to show that I have not made a good faith effort to fulfill my obligation. Gentlemen, I assure you that I have made superhuman effort to try to keep open twenty-four hours a days, seven days a week. There just are no employees out there to be had unless I was paying $15.00 per hour who would be willing to work these hours, stand out in the cold, to freeze and to be wet. May I relate to you my experience because of my situation I had to hire an employee who just came in and I was unable to check his references. The next morning he left with over $300 worth of cash register receipts and now I cannot locate him nor recover the money. My station is located in a rather suburban area, some even call it semi-rural. The police force has been unable to check each of our stations on a consistent basis. My employees who are out there work in fear of their life and I work in fear that something will happen to them. Mobil will listen to none of these issues and the courts have refused to listen to these issues. I have made every effort to engage employees. I have spent numerous dollars in trying to perform pursuant to the franchisor's requirements. I have spared no expense nor effort in trying to keep my station and maintain the station in a clean, respectable, honest and honorable manner. All to no avail. Mobil just wants Jack Kane out and they will grab at every straw and every opportunity to indicate same.

It is therefore that I come before you to ask you to clearly set forth the law so that the courts will know that it is the determination of this body that the consideration of the franchisee's position is required by the Petroleum Marketing Practices Act and that it is not only the franchisor who can walk roughshod over the small man.

Unless there is enacted some indication that it is the intent of this body that the franchisee's position be considered the courts of this country consistently I am so informed by my lawyers have held that the franchisor can do as it wishes just as long as they say they have made the decision in good faith and it is a business decision. All I know is that I have made a business decision. I am trying to make a living. I cannot make a living if they consistently drain my assets by requiring me to lose money every night; I cannot continue to make a living and work by being required to present from 12:00 midnight to 6:00 a.m. and then to repair automobiles, serve gasoline, serve as a trouble shooter for my customers during the day; I cannot continue to operate a fair and reasonable service station when I lose money when the intent of the franchise was to be a two way street, a source of money for the franchisor and a source of money to me, the working man and the working woman of this country.

Thank you gentlemen for permitting me to tell you my story. To this time, I thought I was protected by the statutes which you have enacted and that I was not to be held responsible for failure to operate my station when it was caused by factors beyond my control. It is beyond my control when I cannot find employees. It is beyond my control when the economics do not permit me to pay for employees who might be willing to risk their life at a high enough price to work between 12:00 midnight and 6:00 a.m. Thank you for listening to me and I am willing to answer any questions which you may have. Hopefully, I will be of some assistance.

Mr. FORD. Thank you very much for your testimony, Mr. Kane. Mr. Chisholm.

STATEMENT OF PHILLIP R. CHISHOLM, EXECUTIVE VICE PRESIDENT, PETROLEUM MARKETERS ASSOCIATION OF AMERICA

Mr. CHISHOLM. Good morning, Mr. Chairman and members of the Subcommittee. My name is Phil Chisholm, I am Executive Vice President of the Petroleum Marketers Association of America, which was formerly the National Oil Jobbers Council. PMAA would also like to commend the Subcommittee on its interest in petroleum marketing practices.

PMAA is a federation of 43 state and regional associations representing some 11,000 independent petroleum product marketers. Collectively, these marketers sell approximately 50 percent of the gasoline and 60 percent of the diesel fuel, and three-quarters of the home heating oil consumed in America.

The majority of the marketers sell their product in rural areas, although a few still operate in suburban and urban markets. Nearly 89 percent of these marketers are small businessmen, as defined by SBA size standards. According to our 1986 data book, 36 percent of the gallons sold by PMAA member marketers are made to dealers, either lessee dealers or franchise dealers. Sixty-five percent of the retail outlets that are supplied by our member marketers are outlets that are operated by retail dealers.

I have listened to Mr. Probus and Mr. Kane this morning. I must say that I am sympathetic to many of the problems they have discussed, and outlined for the committee. These are very, very difficult and very, very tough issues for the committee to try to address, and if I had sufficient time this morning I suppose I could add to that list by a significant amount.

However, where Mr. Probus and Mr. Kane and I differ in regards to that is, we strongly believe that S. 2179 will not solve those problems, and in fact may hurt PMAA and the marketers it represents in its role in the marketplace.

PMPA, Petroleum Marketing Practices Act, was enacted in 1978 after several years of debate. In its final form the bill was essentially franchise protection legislation. It was designed to prevent franchisors, refiners and distributors from arbitrarily terminating or nonrenewing their franchise relationship with franchisees, distributors and dealers.

The act spells out conditions under which termination or nonrenewal are permissible and the steps which a franchisor must take to effect a termination or a decision to nonrenew the franchise relationship. It is important to note that the marketers represented by PMAA serve a dual role under PMPA. They are franchisees in the relationship with the refiner-suppliers, and they are franchisors in their relationship with the dealer.

Now, in that unique role we, in examining amendments and proposals relative to PMPA, have to apply our own standards of fairness and equity and reasonableness in determining whether what is being asked of our suppliers that they have to extend to us, is fair and whether it is fair for us to have to extend that to our dealers. In this analysis, we cannot justify what would be demanded of our suppliers to give to us, nor can we justify what we would be demanded to give to our dealers under the provisions of S. 2179.

The legislation before the Subcommittee does three basic things: It provides for the inclusion of ancillary agreements economically necessary to the operation of the franchise under the definition of, "franchise"; it requires that changes in the franchise agreement upon renewal be fair and reasonable; and it requires that franchisees get an opportunity to negotiate directly with a holder of a third-party lease or piece of property if the franchisor refuses to extend the lease.

The most serious concern we have with these amendments relates to the fair and reasonable standard that would be included at the end of a franchise agreement. Several of my members have asked me what "fair and reasonable" means. Would I be able to do this, would I be able to do that? Can I have to—do I have to go to a court to determine this standard or that standard? Frankly, as Senator Nickles pointed out, I do not know the answers to these questions and I do not believe anyone knows what "fair and reasonable" means, and what standards the courts may apply to it. Therefore, the marketers in PMAA are reluctant to throw this issue to the courts to determine what "fair and reasonable" may mean.

It has been said that dealers are not looking to litigate against major oil companies, and I would agree with that statement; any time the committee would like we can share horror stories about the difficulties in litigating against major refiners.

However, the same cannot be said with dealers litigating against jobbers and other independent marketers. Many times these independent jobbers and dealers operate in the same community. They may even have the same attorney, and the economic leverage that this bill would give those dealers versus those small jobbers would be substantial.

You do not see a lot of cases settled by the courts where dealers sue jobbers under PMPA. There is a reason for that: because most of them are settled out of court, most of them are negotiated out of court. What this bill would do is increase enormously the economic leverage the dealer would have to say that what we are doing is not fair, or what you are trying to apply here is not fair and not reasonable.

It also puts the jobber in a difficult circumstance in trying to determine if this is not fair and reasonable, and the Court tells me I have to give you a special deal, do I then have to extend that special deal to all my dealers under the good faith and normal course of business standard that already exists under the act, which as applied by the Court has said essentially that good faith and normal course of business is a nondiscriminatory program offered to all your franchisees? Are we then in violation of that, if we give one dealer a special deal because the Court says what you offered him is not fair and is not reasonable?

Courts have stated that Congress did not intend to provide the maximum of protection to franchisees without regard to the potential cost for franchisors. In fact, one court in *Munow* v. *Amoco* stated that the legislative history of PMPA reflects a sensitivity to the legitimate needs of both the franchisees and the franchisors. The Court illustrated this point by citing the following passage from a Senate report: "Particularly important is that legislation dealing with this subject recognize the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences."

On balance, the Court goes on: "Congress concluded that the added protection which a reasonable effects test would provide to franchisees would not be worth the cost associated with drawing the courts into the role of a rate review agency."

Therefore, it is unreasonable to support S. 2179 so long as fair and reasonable requirement is made applicable to jobber franchisors.

Our testimony outlined some concerns with the other two provisions of the bill, but let me close by just summarizing three basic points in connection with this legislation.

First of all, PMAA does not view this as a big-business versus small business issue. We represent thousands of small businessmen across this country who oppose this bill, and so you cannot say this is just the big refiners against the small dealers. The small businessmen we represent oppose it as well.

Secondly, this bill provides no relief to what PMAA considers to be some major problems in the marketplace, and our fear is that if Congress moves and enacts this, that those other problems will be ignored until some future date down the road 10 years when you decide to look at PMPA again.

Finally, if this bill is enacted it may provide a significant disincentive for our members to continue to operate through dealers. Because there has been an enormous trend in the last 10 or 15 years for our members to move more to direct retail operations and this would accelerate that trend and encourage more people to go that way, because of the difficulty they would have in a franchise agreement, dealing with their franchising dealers.

Thank you very much, Mr. Chairman. I will be happy to try to answer any questions you may have.

[The prepared statement of Mr. Chisholm follows:]

PMAA PETROLEUM
MARKETERS
ASSOCIATION OF
AMERICA

Statement of

Phillip R. Chisholm, Executive Vice President
on behalf of
The Petroleum Marketers Association of America

Before the

Subcommittee on Energy Regulation and Conservation
of the
Committee on Energy and Natural Resources

On

The Petroleum Marketing Practices Act Amendments
(S. 2179)

October 4, 1988
Washington, D.C.

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MEMBERS OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

The Petroleum Marketers Association represents the independent petroleum marketers who are members of these state and regional trade associations:

Alabama Oilmen's Association
Arizona Petroleum Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Independent Connecticut Petroleum Association
Florida Petroleum Marketers Association
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Indiana Oil Marketers Association, Inc.
Petroleum Marketers of Iowa
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Maine Oil Dealers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Mississippi Petroleum Marketers Association
Missouri Oil Jobbers Association
Montana Petroleum Marketers Association
Nebraska Petroleum Marketers, Inc.
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New Mexico Petroleum Marketers Association
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Oregon Petroleum Marketers Association
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South Carolina Oil Jobbers Association
South Dakota Petroleum Marketers Association
Tennessee Oil Marketers Association
Texas Oil Marketers Association
Virginia Petroleum Jobbers Association
Washington Petroleum Marketers Association
Western Petroleum Marketers Association
West Virginia Petroleum Marketers Association
Oil Jobbers of Wisconsin, Inc.
Wyoming Petroleum Marketers Association

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Introduction

Good morning, Mr. Chairman, and members of the Subcommittee. I am Phillip R. Chisholm, Executive Vice President of the Petroleum Marketers Association of America (PMAA), and I am appearing on their behalf. PMAA commends the Subcommittee for its interest in petroleum marketing practices.

The Petroleum Marketers Association of America is a federation of 43 state and regional associations which represent approximately 11,000 companies throughout the United States. Collectively, these marketers account for approximately 50 percent of the gasoline and 75 percent of the home heating oil and 60 percent of the diesel fuel sold in the United States. The majority of marketers sell their products in rural America; however, many marketers also operate in urban and suburban markets. Nearly eighty-nine (89) percent are classified as small businesses by SBA size standards.

Gasoline Distribution and the Independent Marketer

The petroleum marketing industry is very complex and even the most knowledgeable observer can become lost in the maze in which petroleum products are distributed. Since the focus of the Petroleum Marketing Practices Act (PMPA) and S. 2179 is motor fuel marketing, the following is an explanation of the distribution process of just motor fuels.

Motor fuels - primarily gasoline and diesel fuel -- are produced from crude oil at a refinery. Many refiners also produce much of the crude oil they refine. These are referred to as integrated refiners. Other refiners must purchase all of the crude oil they refine from a third party. These are generally referred to as independent refiners.

Once the gasoline or diesel fuel has been refined, it then enters the distribution system. It is generally transported from the refinery by pipeline, truck or barge to a terminal. Once it reaches the terminal, a refiner has several choices as to how to distribute the product.

The refiner may decide to distribute all of the product itself. It would then transport the product to retail outlets it owns and operates or to other retail consumers. The refiner may decide to operate through retail service station dealers. In this instance, the refiner will generally transport the product to the retail dealer who will assume responsibility for retail sales to motorists. In most cases, but not all, the refiner will own the station operated by the dealer. The refiner will lease the station as well as the right to use its trademark or logo to the dealer as part of a franchise agreement.

The refiner may also decide to distribute through an independent marketer. In this instance, the refiner can choose whether he wants to sell to the independent marketer on a branded or non-branded basis. Branded product refers to product which is sold under the refiner trademark.

The independent marketer who buys branded product also has a franchise agreement with the refiner. If the product is sold non-branded, then the marketer does not have the right to use the refiner trademark when he resells it. Generally, but not always, the price of branded motor fuel to an independent marketer is higher than the price of non-branded fuel, the difference being the branded marketer's right to use the trademark and the benefits that trademark may provide in a given market.

Once the marketer purchases the product, he can distribute it in several ways. If he has a franchise agreement with his refiner/supplier, he can resell the product to a service station dealer to whom the marketer also offers a franchise agreement. In many instances, as with refiners, the marketer will own the station and the franchise agreement will include the lease of the station.

Like a refiner, a marketer may also decide to sell the product at a station or outlet he owns and operates. Such stations may be branded (carry a refiner trademark) or unbranded. These stations, whether they are operated by a refiner or a marketer, are generally self service and usually offer ancillary services such as convenience store items or a car wash. Marketers who operate exclusively through such stations are known as "chain retailers".

In many instances, a marketer does a significant amount of his business with consumers or end user commercial accounts. These accounts may be agricultural, commercial or industrial. Marketers supply a high percentage of the agricultural fuels used in this country. They also supply product to truck fleets, police departments, military bases and many other bulk purchasers

While some marketers consider themselves to be strictly wholesalers -- wholesaling product to dealers or other bulk purchasers -- most marketers have diversified their businesses and distribute motor fuels in a number of ways. According to PMAA's 1986 data book, 36 percent of marketers' motor fuel sales are made to dealers; 34 percent are made to their directly owned and operated stations; and approximately 30 percent are made to bulk end user purchasers. PMAA's data also shows that over half, or 65 percent, of the retail outlets supplied by marketers with motor fuels are dealer outlets. Of this 65 percent, 21 percent were lessee dealer outlets.

Petroleum Marketing Practices Act

The Petroleum Marketing Practices Act (PMPA) was enacted in 1978 after several years of debate. In its final form, the bill was essentially franchise protection legislation. It was designed to prevent franchisors (refiners and distributors) from arbitrarily terminating or nonrenewing the franchise relationship with franchisees (distributors and dealers).

The term "franchise" is defined in terms of a motor fuel trademark license owned or controlled by a refiner. Leases of real property and motor fuel supply agreements are also incorporated in the definition of a franchise.

The act spells out conditions under which termination or nonrenewal are permissible and the steps which a franchisor must take either to effect a termination or a decision to nonrenew the franchise relationship (i.e. cause, notification, etc.). In instances where a franchisee feels that a franchisor has failed to comply with the Act, he may bring a civil action against the franchisor. The courts are authorized to grant equitable relief necessary to remedy the violation. A preliminary injunction is to be granted if the franchisee can demonstrate the existence of sufficiently serious questions, going to the merits, to make them a fair grounds for litigation; and the court determines that balancing of the hardship indicates that the hardship suffered by the franchisee if the injunction were not granted would be greater than the hardship imposed on the franchisor by issuance of such relief.

It is important to note that the marketers represented by PMAA serve a dual role under the PMPA. They are franchisees in their relationship with their branded supplier. But they are franchisors in their relationship with the branded dealers which they serve. This dual role has presented some problems to independent marketers since the existing PMPA is written in such a way as to treat all franchisors as if they were major refiners and to treat all franchisees as if they were retail dealers. Marketers are obviously neither refiners nor dealers.

As the body of case law developed since enactment demonstrates, the PMPA is a statute which concerns itself primarily with procedural matters. Its scope does not extend beyond the protection of franchisees against defective notice and improper terminations and nonrenewals.

Amendments such as those contemplated in S. 2179 continue this narrow perspective of PMAA and worsen the Act's impact on the small business independent petroleum marketer represented by PMAA. We therefore wish to express our strong opposition to this legislation. PMAA would be happy to discuss, at the Subcommittee's convenience, ways PMAA can be broadened to help independent marketers as well as dealers.

Concerns With S. 2179

The legislation before the Subcommittee does three basic things: (1) it provides for the inclusion of all ancillary agreements economically necessary to the operation of the franchise under the definition of "franchise"; (2) it requires that changes in the franchise agreement upon renewal be "fair and reasonable"; and (3) it requires that franchisees get an opportunity to negotiate directly with the holder of a third-party lease on a piece of property if the franchisor refuses to extend the lease.

Because independent marketers operate both as franchisors and franchisees under the Act, they must attempt, when considering questions relative to PMPA, to balance the fairness and equity of what they receive from their suppliers as franchisees versus the fairness and equity of what they must extend to their dealers as franchisors.

In this context, what marketers may gain from their suppliers under these two bills, is far outweighed by what marketers, as franchisors, must extend to their dealers. That is why PMAA views this bill almost exclusively from a franchisor's perspective.

The most serious concern we have with these amendments relates to the "fair and reasonable" requirement. This, of course, requires that at the end of the franchise agreement, any changes in the renewal agreement must be "fair and reasonable." This has very limited application to marketers in their role as franchisees. The problem most marketers have with their franchisors is that they are not "fair and reasonable" during the term of the franchise agreement.

This requirement, however, has very serious ramifications for marketers in their role as franchisors. Several marketers have asked me: "What does fair and reasonable mean? Can I do this? Can I do that? Will I have to negotiate separate franchise agreements with each of my dealers? If I do negotiate a separate franchise agreement with my dealers, then am I vulnerable to be sued because I a not making changes in compliance with the 'good faith and normal course of business' standard that has been in the law for ten years?" Under this standard, the courts have held that good faith and normal course of business requires that the franchise terms be offered on a non-discriminatory basis.

I do not know the answers to these questions nor do I believe anyone else does. My membership is therefore reluctant to throw this issue to the courts and be told on a case by case basis, what is fair or what is reasonable.

It has been stated that dealers are not anxious to sue the major oil companies and therefore litigation is not likely to increase substantially. I can vouch full well to the difficulty in litigating against major oil companies. However, the same situation does not exist between dealers and jobbers. Jobbers, as small businessmen in the community, do not have the economic or legal leverage of a major oil company. Therefore, a dealer lawsuit or threat of such a lawsuit, based on such an ambiguous standard as, "fair and reasonable", increases enormously the leverage that a dealer can apply to his jobber supplier. PMAA does not believe that one small businessman ought to have that much leverage over another small businessman, especially when the latter individual is the one who owns the property and has made the substantial financial investment in the facility.

Courts have stated that Congress did not intend to provide the maximum amount of protection to franchisees without regard to the potential cost for franchisors. In fact, the court stated in Munno vs. Amoco, 488 F Supp. 1114 (D. Conn. March 17, 1980) that the legislative history of PMPA reflects a sensitivity to the legitimate needs of both the franchisees and the franchisors. The court illustrated this point by citing the following passage from a Senate report:...particularly important is that legislation dealing with this subject recognize the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." Id. at 11230.

On balance, the court states, "Congress concluded that the added protection which a"reasonable affects" test would provide to franchisees was not worth the costs associated with drawing the courts into the role of rate-review agency."

Therefore, it is impossible for PMAA to support S. 2179 so long as the fair and reasonable requirement is made applicable to jobber franchisors.

Another provision of S. 2179 redefines the term franchise to include "all ancillary agreements economically necessary to the operation of the franchise."

Under this provision, a franchisor would not be allowed to terminate a franchisee during the term of the franchise for failure to comply with certain ancilliary agreements without following the mandates of PMPA. Such agreements might include contracts relating to financing of equipment, contacts for the purchase and sale of tires, batteries, or other automotive accessories, and changes to the station or in the operation of the station that are requested by the franchisor.

PMAA believes this expansion may benefit franchisee dealers but does little for franchisee marketers. This is because most of the agreements that will be considered ancillary by the courts are agreements regarding the actual station or its operation. Since the overwhelming majority of marketers do not lease stations from their suppliers, but own them outright, this provision would not serve to benefit marketers as franchisees. It could, however, serve to significantly impede the good business judgment of the marketer franchisor with regard to the station he leases. As a result, efficiency might suffer and the cost of product to the consumer could increase.

The final provision of the S. 2179 requires franchisees to be notified of the underlying lease at least 90 days prior to the expiration of the option. Again, due to the fact that few marketers lease their stations from their suppliers, PMAA does not believe this provision will significantly benefit the vast majority of marketer franchisees. However, this provision may result in the 21 percent of marketers who are leasing stations to dealers to have to continue supplying a dealer, no matter how uneconomical to the marketer, if the dealer reaches an agreement with the underlying leaseholder.

For all of these reasons, PMAA respectfully urges that S. 2179 not be considered by the Subcommittee. PMAA appreciates the opportunity to appear before the Subcommittee and will be happy to answer any questions you may have.

Mr. Ford. Thank you, Mr. Chisholm.
Mr. Smith.

STATEMENT OF DAVID C. SMITH, VICE PRESIDENT, MARKETING, CHEVRON, U.S.A.

Mr. Smith. Good morning Mr. Chairman, Senator Nickles. I am David C. Smith, Vice President of Marketing for Chevron U.S.A. I am here today on behalf of the American Petroleum Institute and its member companies to express opposition to the proposed amendments to the Petroleum Marketing Practices Act contained in S. 2179. I wish to go on to make a brief statement summarizing API's position on these matters.

It is the API's view that the proposed amendments are both unnecessary and anticompetitive. The PMPA enacted in 1978 in our view established a balance between the interests of dealers and their suppliers, with Congress acting as arbiter and from the standpoint of the public interest we believe the statute has served both sides well, and more importantly has benefited the consumer.

More specifically, Section 2 of the bill expands the definition of "franchise" to include any contract economically necessary to the operation of the leased marketing premises. While this on the surface may not appear troublesome, it would nevertheless require the courts to determine on a case-by-case basis what is economically necessary and what is not. This would undoubtedly result in further litigation and confusion contrary to the intent of Congress in passing PMPA in 1978.

The proposed broadening of the definition fails to take into account the essential purpose of PMPA's enactment, that was to protect a franchisee's security in the trademark license. Furthermore, Section 3 of the bill requires all changes in the franchise agreement to be "fair and reasonable" if the failure of the parties under PMPA to agree to those changes is to be used as a reason for nonrenewal.

Current law already requires that such changes be made "in good faith and in the normal course of business" and not for the purpose of preventing renewal. These are important safeguards for the dealer, and are readily understood. In contrast to the current law, the terms "fair and reasonable" are not easily defined, and the use of this standard would lead to endless litigation seeking to determine what is "fair and reasonable" in any particular case.

Any change the supplier, refiner or jobber wants to suggest would be subject to an initial veto by dealers. Therefore, judges and juries would be asked to sit as a super legislature to determine what parts of the relationship between suppliers and dealers should be changed for the future.

This change proposed by S. 2179 in our view would have a chilling effect on innovation in gasoline marketing, resulting in less competition and decreased service to the consumer.

In addition, under the amendments the courts would be compelled on a case-by-case basis to second-guess the business judgment of franchisor decisions. Franchisors would naturally be reluctant to be innovative because of the threat of protracted litigation. For the most part, current contract terms and methods of operation would be frozen in place, and I think it is very important to realize that this, of course, would place PMPA suppliers and their dealers together at a severe competitive disadvantage relative to other gasoline marketers not covered by PMPA. These other gasoline marketers, such as chain convenience store operators, would be totally unfettered by PMPA in their business operations.

The end result of failure to innovate and adjust in a changing market is the loss of one's market position, both ours and our dealers. If the suppliers cannot keep up with the innovations of its competitors, its dealers will be less competitive as well.

In conclusion, it is our view that existing federal laws and competition in today's marketplace are providing an adequate balance between the rights of suppliers and those of their brand-name customers.

S. 2179 is harmful and unnecessary legislation which we strongly oppose. Such radical changes in the existing PMPA would harm consumers, suppliers and affected dealers, while increasing litigation. We therefore strongly urge the rejection of the proposed amendments to the Petroleum Marketing Practices Act, and I would be happy to answer any questions during the remainder of the hearing.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Smith follows:]

Statement of David C. Smith
on behalf of the
American Petroleum Institute
before the
Energy Regulation and Conservation Subcommittee
of the
U. S. Senate Committee on Energy and Natural Resources
S. 2179 -- PMPA Amendments
October 4, 1988

Mr. Chairman, members of the subcommittee, I am David C. Smith, Vice President of Marketing for Chevron U.S.A. I am here today on behalf of the American Petroleum Institute (API) and its member companies to express opposition to the proposed amendments to the Petroleum Marketing Practices Act (PMPA) contained in S. 2179. API represents more than 200 companies engaged in all aspects of the oil and gas industry including exploration, production, refining, transportation and marketing.

Radical Change - Not Fine Tuning

PMPA, as passed in 1978, was the result of a significant and sincere effort by Congress to act in the best interests of consumers by balancing the rights of suppliers, refiners and jobbers, with the perceived needs of dealers for additional protection beyond that provided by general business and antitrust law. While these proposed amendments are frequently portrayed as "fine tuning," in reality, they represent a serious and radical departure from this carefully crafted approach by Congress. S. 2179 would harm consumers, franchisors and franchisees alike by impeding desirable changes in franchise operations. Many of the basic decisions on the future of petroleum marketing would be taken from suppliers and put into the hands of judges and juries. The result, of course, would be a significant and unnecessary increase in PMPA litigation.

Suppliers often make investments of $1 million or more in service stations operated by lessee dealers. With little or no say over the future of these investments, suppliers understandably will be reluctant to make them. Thus the bill would discourage the establishment of new franchises and other marketers not covered by PMPA will gain the initiative competitively.

Trends Beneficial To Consumers and Efficient Marketers

The proponents of S. 2179 have pointed to trends in the 1980s such as the increased number of service stations offering convenience products and self service, to support the need for this legislation. In reality, these trends reflect a competitive marketplace responding to consumer demand.

The ending of petroleum product price and allocation controls in 1981, which had largely frozen gasoline marketing arrangements in place for nearly a decade, opened up many avenues to serve consumers. Consumer demand for convenience and the lowest possible gasoline prices led marketers to an increase in self service and to offer gasoline in conjunction with products and services other than the traditional auto repair services of conventional service stations. As capital costs of stations rose, while demand remained relatively flat, fewer, but higher volume and more efficient, gasoline outlets were needed to serve consumers. Other industries (for example, tire outlets and quick lube facilities) moved to compete for the patronage of the many consumers who change their own motor oil, as well as for the business previously supplied by the conventional service station. All of this was done to meet the demands of consumers. In this environment it was virtually inevitable that the total number of stations would decline. As is true of any competitive industry, some marketers were unable to serve the consumer efficiently enough to stay in business.

Nevertheless, the evidence reveals that many marketer proponents of S. 2179 have done remarkably well in this environment. For example, the share of the total U. S. gasoline market accounted for by lessee dealers of 14 of the largest U. S. suppliers rose from 18% in 1981 to 21% in 1986. In addition, the average annual throughput of these dealers increased by 11.8% per year from 1982 to 1986, to one million gallons per year. (I might mention as an aside, that the comparable increase for salary operated stations was somewhat less -- 7.6% per year.) A recent survey of lessee dealers found average dealer margins in 15 U. S. markets to be 11.6 cents per gallon, far above the 7 to 8 cents per gallon that dealer testimony before Congress in 1985 indicated was necessary to keep dealers in business. Significantly, dealer turnover rates have declined from the 20% to 30% range of the 1950s to 10% currently. Furthermore, anecdotal evidence indicates that at the present time dealer blue-sky sales prices range from $50,000 to as much as $500,000 per station.

The relationship between dealers and their suppliers is contractual and, at times, characterized by competing interests. This plus the dynamics of a competitive marketplace would lead one to expect some disputes to arise. But this is normal and indicates a healthy marketplace rather than one requiring Congressionally-mandated changes.

Amendments Unnecessary and Anti-Competitive

PMPA, enacted in 1978, established a balance between the interests of dealers and their suppliers, with Congress acting as arbiter and from the standpoint of the public interest. We believe this statute has served both sides well and, more importantly, has benefited the consumer. It has provided a basis for post-decontrol adjustments to consumer demands. We question -- particularly in view of indications of dealer health previously discussed -- what has changed to require Congress to upset the balance that was originally established.

The amendments contained in S. 2179 are unnecessary and, if enacted, would be anti-competitive and harmful to consumer interests. The provisions of this bill effectively limit the ability of suppliers to terminate or non-renew existing contracts on currently lawful and, we believe, appropriate grounds. The end result of this would be to frustrate innovation, efficiency and greater customer service in gasoline marketing.

Section 2

Section 2 of the bill expands the definition of "franchise" to include any contract "economically necessary to the operation" of the leased marketing premises. While this, on the surface, may not appear unreasonable, it would nevertheless require the courts to determine on a case-by-case basis what is "economically necessary" and what is not. This would result in further litigation and confusion, contrary to the intent of Congress in passing PMPA in 1978. The proposed broadening of the definition fails to take into account the essential purpose of PMPA's enactment -- to protect a franchisee's security in the "trademark license" granted by the franchisor while maintaining the flexibility to which the owner of the trademark must have a right.

For example, franchisors would be discouraged from offering ancillary benefits or programs such as car care programs, insurance programs or credit card agreements. Under the change contemplated by S. 2179, these programs could only be terminated or changed as part of a broader termination or non-renewal on grounds specified under PMPA. Consequently, suppliers may become reluctant to offer them in the first place for fear of being locked in.

This provision would impede more efficient and innovative marketing changes in franchise operations, thereby harming consumers. Recent examples would be the cash discount offered by some marketers and the debit card or debit feature other marketers have added to their credit card. Gasoline marketing is a vigorously competitive business, with a wide variety of strategies and offerings and a large number of competitors. This environment should be encouraged to continue so that marketers can change their strategies to meet current competitive conditions.

The change in the definition of "franchise" would discourage contracts covering the sale of non-gasoline items, such as equipment for automotive maintenance and repair, tires, batteries, etc. Some of these are temporary programs. Under this provision, however, such programs would be subject to the same restrictions as the lease and product sales agreement and consequently might have to continue indefinitely.

Section 3

Section 3 of the bill requires all changes in the franchise agreement to be "fair and reasonable" if the failure of the parties under PMPA to agree to those changes is to be used as a reason for nonrenewal. Current law already requires that such changes be made in "good faith and in the normal course of business" and not for the purpose of preventing renewal. These are the important safeguards for the dealer and are readily understood. In contrast to the current law, the terms "fair and reasonable" are not easily defined and the use of this standard would lead to endless litigation seeking to determine what is "fair and reasonable" in any particular case.

It is also important to realize that "fair and reasonable" standards are not commonplace in federal, state or local law. Approximately 20 states have franchise laws of general application covering franchise relationships and their termination and nonrenewal.

We know of no general franchise law which includes a broad "fairness" or "fair and reasonable" standard of the type contemplated here. Under the standard proposed by the bill, one must determine how the interests of suppliers and dealers should be balanced. If dealers succeed in obtaining this amendment, any change that a supplier (refiner or jobber) wants to suggest would be subject to an initial veto by dealers. Thereafter, judges and juries would be asked to sit as a super legislature to determine what parts of the relationship between suppliers and dealers should be changed for the future. This is a role that the courts traditionally have been unwilling to accept and is one for which they have not been trained.

Under the Uniform Commerical Code (UCC), good faith is the standard used -- not reasonableness. The concern is that good faith be exercised in carrying out the terms of an existing agreement. PMPA, like the UCC, already requires that parties exercise good faith in carrying out the terms of a franchise.

It is particularly significant that the UCC provision is not concerned either with initial contract formation or with renewal. The UCC generally presupposes that there will be free negotiations and that the agreement reached by the parties will be controlling. The UCC assumes furthermore that there will be no renewal unless both parties agree to it.

The dealers say that there has been no flood of litigation under state franchise statutes or under the UCC. From this, they conclude that there would be no flood of litigation if a "fair and reasonable" standard were adopted for changes suggested under the failure to agree provisions of PMPA.

We think the dealers are mistaken about this because we are dealing with a unique situation. As we pointed out earlier, "fair and reasonable" is not the test under either the state franchise laws or the UCC. What the dealers want is a mandated renewal plus a "fair and reasonable" standard for governing what the future terms of the franchise relationship will be. There is no prior history to consider because the type of provision that the dealers want, in this setting, is far beyond what appears in any statute of which we are aware.

The change proposed by S. 2179 would have a chilling effect on innovation in gasoline marketing, resulting in less competition and decreased service to the consumer. This provision would replace the standards currently required by PMPA -- objective standards which are understood by franchisors and franchisees and which have been upheld by the courts.

Under the amendments, the courts would be compelled, on a case-by-case basis, to second guess the business judgment of franchisor decisions. Franchisors would naturally be reluctant to be innovative because of the threat of protracted litigation. For the most part, current contract terms and methods of operation would be frozen in place. This, of course, would place PMPA suppliers and their dealers at a severe competitive disadvantage relative to other gasoline marketers not covered by PMPA. These other gasoline marketers, such as chain convenience store operators, would be totally unfettered in their business operations.

The legislative history of PMPA shows that Congress clearly intended to avoid putting the courts in the position of being the final arbiter of business decisions:

> "At this point it is appropriate to note that considerable debate has focused upon recognition of so-called 'reasonable business judgments' of the franchisor as grounds for termination or non-renewal. This standard has not been adopted by the committee. Instead, a two-fold test has been utilized to judge certain specified determinations including that of market withdrawal.
>
> "One test is whether the determination was made 'in good faith'. This good faith test is meant to preclude sham determinations from being used as an artifice for termination or non-renewal. The second test is whether the determination was made 'in the normal course of business'. Under this test, the determination must have been the result of the franchisor's normal decision making process. These tests provide adequate protection of franchisees from arbitrary or discriminatory termination or non-renewal, yet avoid judicial scrutiny of the

business judgment itself. Thus, it is not necessary for the courts to determine whether a particular marketing strategy, such as a market withdrawal, or the conversion of leased marketing premises to a use other than the sale or distribution of motor fuel, is a wise business decision" (Senate Report, p. 37).

Furthermore, the process of case-by-case review in the courts would not solve the problem. What was considered to be "economically necessary" or "fair and reasonable" to a jury in one part of the country might not be to another jury somewhere else or even to a jury in the same state. For this reason suppliers would find it impossible to know in advance whether changes in marketing activities could be implemented nationwide.

By replacing the certainty that exists under the current provisions of PMPA with the uncertainty these amendments would cause, the bill would mean decreased choices for the customer. And any supplier which decided to take the risk of developing a truly innovative marketing program will almost inevitably find itself litigating the program in court.

Section 4

Finally, Section 4 of the bill requires the franchisor to continue supplying the franchisee with product if the franchisee is able to negotiate a lease with a third party landowner or lessor of the underlying lease, even though the franchisor's own lease on that property, on which the franchise was based, has expired. In effect this forces the continuation of the franchise relationship through a contract to which the franchisor is not a party. Currently PMPA allows expiration of the base lease to be used as grounds for termination or nonrenewal provided the franchisee has been notified in advance that such an event might occur.

It is very uncertain how the proposed amendment would work in practice. First, it is important to consider that the dealer always has the right to negotiate a new lease with the ground lessor if the underlying lease expires. If this is done, the supplier normally would be out of the picture altogether. The amendment, however, contemplates that the supplier's contract for gasoline will continue in effect.

It is totally unclear whether the dealer would have an entirely new lease with the landowner or would somehow be retaining possession pursuant to the old one with the supplier. If the old lease is kept in effect, the supplier would remain a guarantor of the dealer's obligations. The most serious of these would be the duty to indemnify the landowner against any environmental problems. This is highly undesirable and most unfair. It may have been a concern about environmental problems, or the cost of replacing underground tanks, that caused the supplier to decide not to exercise an option to extend the underlying lease.

Moreover, the amendment says nothing about the improvements owned by the supplier that are located on the leased premises. If the dealer negotiates a new lease with the ground lessor, the supplier should be able to remove its improvements. But, the bill suggets that the improvements will remain on the site. Would the supplier be entitled to receive rent for the improvements, i.e., the station and facilities, and if so, at what rate? Would the dealer become responsible for maintaining the underground tanks himself or would the supplier be required to do this? Would the dealer have the right to buy the improvements? If so, at what price? These are important questions. Who will decide them?

It is apparent that the proposed amendment raises as many problems as it attempts to solve. We think it would be a mistake to enact it.

Conclusion

Proponents of this bill claim they need additional protection from the alleged unfair activities of suppliers and that these changes will provide them with such protection and allow them to remain in the service station business. In the long term, by reducing the flexibility and competitiveness of suppliers who are subject to PMPA, the dealers of those suppliers may actually be harmed. Their suppliers will be unable to respond to changing consumer preferences as rapidly as those companies which are not subject to PMPA. The end result of failure to innovate and adjust in a changing market is the loss of one's market position. If the supplier cannot keep up with the innovations of its competitors, its dealers will be less competitive as well. We believe that establishing barriers to change is not in the long term interest of the very dealers who seek this legislation.

In our view, existing laws and competition in today's marketplace are providing an adequate balance between the rights of suppliers and those of their brand name customers. S. 2179 is harmful and unnecessary legislation which we oppose. Such radical changes in the existing PMPA would harm consumers, suppliers and dealers, increase litigation and undermine the intent of Congress in enacting the law in 1978. When PMPA was enacted, the Senate Report accompanying the bill stated:

> "Legislation in this subject area requires recognition of the legitimate needs of a franchisor to be able to terminate a franchise or not renew a franchise relationship based upon certain actions of the franchisee including certain failures to comply with contractual obligations or upon certain changes in circumstances. Particularly important is that legislation dealing with this subject recognize the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences" (Senate Report, p. 19).

The changes proposed by S. 2179 destroy this flexibility and we strongly urge their rejection.

Senator FORD. Thank you, Mr. Smith. Senator Nickles, if it is all right with you I will question the panel, and anybody that wants to chime in any time just do so. We can find out more that way. And then you can take the panel and, since there are only two of us, time is not moving too fast.

Mr. Probus, let me just say this. I was here on the dealer's day in court, and it seems like the City Hall keeps squeezing a little bit, and then we came with PMPA, and things began to squeeze a little tighter. Now here we are again with another bill, trying to protect the little fellows, and of course Mr. Chisholm says little fellows do not want to be protected in his organization. So we have got to find a way to get to it. But Mr. Probus, I remember a big decline in a number of the dealers before PMPA. What has been the trend since then?

Mr. PROBUS. I would like to introduce our General Counsel, Jim Daskell, who is the most knowledgeable person in the country on PMPA law and legislative history. But I would like to take a crack at this question here, because what Mr. Chisholm is referring to and my knowledge of the small jobbers, most of them that I know do operate their own facilities. They do not use dealers as much as, maybe, the oil companies in Kentucky.

There are a great many small jobbers, and a big majority of them are jobber operated direct, and I do not know where he is really coming from with saying that this would have that great an effect on the jobbers by making them go to direct operations, which is a trend they established some time ago. Jim, do you want to comment?

Senator FORD. The question I am really trying to get to here, what has the trend been as far as the decline in the number of dealers after PMPA was enacted?

Mr. DASKELL. The trend has continued, basically, unabated. I think the last Commerce Department figure we saw was that, I think we had under 5,000 stations in 1986. I would have to double-check it to be sure, but the rate of decrease has slowed somewhat. But it is still not a very significant slowing.

Mr. FORD. Did it accelerate after that one court gave, what is it, good faith decision? You have a court decision that says good faith, that was the request of the companies, and whatever the companies requested based on analysis. Was there good faith?

Mr. DASKELL. Oh, absolutely, Senator. I think it is important to realize what we mean by the term, "good faith". In the first PMPA case that went to a full en banc panel of seven judges in the United States Court of Appeals for the 3rd Circuit, they said that the good faith standard was ephemeral. It was without meaning and that a franchisee would virtually never be able to show its absence, and that is precisely the case.

"Good faith" is really a term of art that is used throughout American law, but our problem is is that "good faith" as it is interpreted under the Petroleum Marketing Practices Act is just different from "good faith" anywhere else in American law, and gives the party that asserts good faith much more leeway than anywhere else.

Let me give you an example. Under the Uniform Commercial Code, that defines "good faith" in section 1203, that says that the parties must observe reasonable commercial standards of fair dealing. But reasonable commercial standards and concepts of fair dealing simply have not played any role under PMPA.

A number of state franchise laws and service station dealer-day-in-court acts use a good faith standard, but they define it in a way that allows you to look at objective criteria, and not simply what the franchisor thinks is good faith or what the franchisor thinks is reasonable. Probably the leading example of that would be the Louisiana dealer day-in-court law which defines "good faith" essentially to mean "objectively reasonable".

So the fundamental problem is the way we define "good faith". It has become a term of art that is unique to PMPA, and I would submit that is unique to the Anglo-American jurisdictional system. There is just nowhere else in any body of commercial law where so much discretion is granted to one party on the side of a contract.

I think it is fair to say that the PMPA has evolved to the point where it has become a one-way-street of special privilege. Even the automobile day-in-court law, which used the good faith standard, does not give a franchisor the unfettered discretion that "good faith" does under the PMPA.

The other thing I would like to comment on is, we talk about what we mean by the word, "reasonable" as if this were something new or something foreign.

Senator FORD. Well, let me say this. I asked you a question. I am beginning to get a lesson, and I do not need that. I am not a lawyer and I do not intend to go to school for it. But let us try to stay with answering the questions, and I am not trying to be facetious here. But we all know what a filibuster is. Mr. Chisholm's been fidgeting.

Mr. CHISHOLM. I just wanted to respond to the question.

Senator FORD. I did not want to interrupt you too much, but you were going a little too far.

Mr. CHISHOLM. I wanted to respond to the question, and I think a lot of the decline in the number of retail service stations really are not directly related to the PMPA as much as they were related to the decontrol of oil in 1981, and when all price and allocation controls were lifted on oil I think you saw a wholesale decline in the number of service stations.

Not only did you see a wholesale decline in the number of service stations as a result of that, you also saw a wholesale decline in the number of jobbers. Our ranks dwindled by a third following decontrol in 1981, and as a result you have seen a decline in the number of major oil companies and the number of refineries throughout the whole industry. There has been that type of enormous shakeout.

The comment Mr. Probus made about the number of jobbers serving dealers—as I said in my prepared remarks, in terms of volume, that our members supply 36 percent of the volume and this is 1986 data. We will have the updated data in a few months. 36 percent of the volume goes through retail dealers, and 65 percent of the outlets that are supplied are outlets that are operated by retail dealers.

Finally, Senator Ford, you made the comment that we did not want to be protected. I did not mean to leave that impression.

Senator **Ford**. Well, if you would stick to the questions instead of elaborating, you know, we might get this hearing over.

Mr. **Chisholm**. I apologize.

Senator **Ford**. I understand where you are coming from. We cannot tell the jury to disregard your remarks, but what I am trying to do is to ask you some questions and lead you up a path, and so I can try to be a better senator and work for your best interests too. Now, let me ask you this. Well, Mr. Smith, did you want to make any comment?

Mr. **Smith**. The only comment I wish to make would be that our statistics indicate that in 1981, lessee dealers had 18 percent market share as a class. In 1986 they had 21 percent market share.

Senator **Ford**. Now let us get back, then, to Mr. Probus. What kinds of contracts do you think should be covered under the "economically necessary to the operation of the franchise" language in S. 2179. If you want to let your counsel answer that, that would be fine with me.

Mr. **Daskell**. Senator, what we are talking about with this is really covering termination of a part of the franchise package. That as a practical matter forces the franchisee out of the location. Let me give you the most graphic example.

In one case, we had a franchisee who operated a convenience store. Now, I am sure as Phil and Mr. Smith will tell you, to make it in today's gasoline market you really do need an ancillary profit center, be it service bays, be it a convenience store, what have you. Under a couple of these cases what they have said is that if the franchisor terminates the right to utilize that ancillary business you do not have any recourse, under the PMPA, even though the economic effect is to knock you out of business.

In other words, that continued right to sell gasoline, as a matter of economic reality, just does not mean anything to you because as a practical matter, you are gone. Quite frankly, if these ancillary agreements are not covered by PMPA, then on the other hand they have to be covered by state franchise law which I suspect the franchisors in a number of cases would find more onerous than being covered by PMPA.

Another example is where you have a discriminatory taking-away of a right to, for example, use a credit card. Let me emphasize that we are not talking about something like a system-wide change like Arco did, but something, for example, where you have a franchisee, where maybe 70 percent of his sales are on the credit card.

He refuses to agree to some new demand of the franchisor so the franchisor says, fine, we will just cut off your credit card sales and the customer will pull into the station and say, wait a minute you have got the Amoco torch out here but you cannot take the Amoco card? That is not a hypothetical, that is a real-world example.

So it is those agreements that are just so economically intertwined with the right to sell gasoline that we are proposing be covered by the agreements. Other things, tire, battery, accessory things and so forth, obviously would not be.

Now you heard the objection that this is going to require the courts to determine what contracts are part of the franchise and what are not part of the franchise. The problem with that argument is that is what they have to do now. The PMPA defines the franchise primarily in terms of the motor fuel supply agreement. The real estate lease, and agreements that are necessary to the support of those agreements are just really not stating any more than existing law.

Senator FORD. Does anybody have any comment?

Mr. PROBUS. Mr. Chairman, I would like to answer your earlier question. In 1977, there were 220,000 service stations, there now may be 110,000 with only 60,000 of those being dealer-operated.

Senator FORD. When you say dealer-operated station, could that be in any form, or would that be both self-service and full-service?

Mr. PROBUS. That could be any.

Senator FORD. Would that be auto-repair or does it generally take in all of that? I understood you in your opening statement to say that you now have a market with yours.

Mr. PROBUS. I do not do repairs any more but I am still a dealer station. I do not do auto repairs, I do not have a wrecker any more, and that is somewhat the trend. My neighbor a block away ran a full-service Chevron facility. He was doing quite well with it and did not want to change it, but Chevron decided to bulldoze it and make it a little C-store, or small food market, and I bet it is kind of difficult making it under those circumstances. He had no choice in the matter.

Senator FORD. How many stations are in your area that the wife could call up and ask you to come start her car? How many of those are out there that do that all the time?

Mr. PROBUS. You know, you really hit home on that because I get a lot of requests from down-town Louisville for wrecker runs and service runs, repairs, emergency repairs. They say where can I go get it, and when I start thinking—a block away, that is gone, and three blocks away is gone, and four blocks away is gone. I have to send them several miles, either to the east-end suburbs or the west end.

Senator FORD. Well, I hope Chevron never closes the Strales service station in Owensboro. If you do, you have got trouble. [Laughter]

Senator FORD. Now that we have got that done, let us talk a little bit—and this will be my last question for the moment—to you Mr. Probus, for your counsel. How do the proposed amendments also benefit consumers?

Mr. PROBUS. Well, to save what is left of the service station industry, and to save this industry for small business people is an opportunity to participate in small business and in the American way of life. We feel it is important, because when we travel we experience first-hand the difficulties when we have minor breakdowns of not having access to the service station, as we have experienced in the old days. I think it is our obligation to help save this industry for the future.

Senator FORD. Mr. Kane, when you talked about Mobil saying in your contract that you had to be open 24 hours a day and they came back with these studies and everything, and probably did not take into consideration 12 to 6 and possible robberies, loss of life and et cetera, did you finally agree to the 24 hour service? Apparently you did. You said you worked from midnight to 6 on occasion.

Mr. KANE. Quite reluctantly I did, yes. I had no other choice.

Senator FORD. How did your percentage of profit go? Up or down?

Mr. KANE. It remained the same. It did not increase as they said it would. They said if I stayed open at night it would increase my daytime business. They were wrong. I have proved them wrong. They know that they are wrong.

Senator FORD. Did your expenses then increase?

Mr. KANE. Most definitely, sure.

Senator FORD. But your income did not increase?

Mr. KANE. Not at all.

Senator FORD. So therefore you lost money.

Mr. Kane Documented.

Senator FORD. Documented?

Mr. KANE. Correct.

Senator FORD. Did the number of gallons increase? The sale of gasoline from your station, substantially?

Mr. KANE. Quite to the contrary. As a matter of fact it went a little bit less. I did more business between the hours of 7 and 12, than I had all night. Maybe 100 gallons during the night from 12 to 6, and it has not gone above that.

Senator FORD. 100 gallons?

Mr. KANE. That is correct.

Senator FORD. You are not going to pay many employees for that.

Mr. KANE. Not at all.

Senator FORD. Thank you, Mr. Kane. Mr. Chisholm, what percentage of your membership are franchisors and franchisees?

Mr. CHISHOLM. About 80 percent of our people would be defined under PMPA as franchisees under the Petroleum Marketing Practices Act. Of that number, my guess would be probably 60 to 70 percent of those would have a franchisor relationship with some retail dealer.

Senator FORD. All right. You said about 80 percent. What is the other 20 percent?

Mr. CHISHOLM. The other 20 percent would be basically unbranded gasoline distributors who operate under their own brand name and do not carry the brand name of a refiner.

Senator FORD. Now when you say a franchisor and it is a name brand, do they then have a contract with, say, Chevron or Shell or whatever?

Mr. CHISHOLM. They would generally be purchasing on a spot market and be buying wherever they could. Sometimes they will have a contract with a specific supplier. Many times a major branded supplier will refuse to deal with those people, selling all their product to branded distributors. But sometimes they operate on a contract, sometimes they buy on a spot market basis.

Senator FORD. Well, I have seen a lot of different name brand trucks pulled in filling up with tanks of non-brand—you know, that fill-her-up special—and you might see during the course of a month two or three different name-brands in there selling. The point I am trying to make here, and I think you substantiated that: your franchisor is also a franchisee of a major oil company.

Mr. CHISHOLM. I am not sure I am following you.

Senator **Ford**. Well what you have is a major oil company and then you have your jobber, so he is a franchisee of the major oil company, is he not?

Mr. **Chisholm**. Right.

Senator **Ford**. We are having objections from them to this bill right now.

Mr. **Chisholm**. Exactly.

Senator **Ford**. So then they become the franchisor down to the service station dealers. So you have got a chain there, where there is a big one that is already out here, and I suspect they would object to this jobber getting other gasoline from other places. They would have to be exclusive.

Mr. **Chisholm**. Absolutely. They do object, but the economics of the market have dictated that for most of our people they will have more than one supplier.

Senator **Ford**. Well, I understand that. But do they not have a contract, though? Could it be canceled because they do not get all their gasoline from their original contract?

Mr. **Chisholm**. Not generally, unless——

Senator **Ford**. Do you mean the dealer cannot do what the jobber can do?

Mr. **Chisholm**. Well in this context the jobber cannot buy Chevron gasoline or sell it as Amoco, or sell it some other way. But he can operate a Chevron station and an Amoco station and a Shell station and buy gasoline from all those different suppliers and have separate contracts with each supplier. He may also have a "Joe's Gas and Go" on the side, where he may use a little bit of any of that gasoline in those stations.

Senator **Ford**. But he has a contract with Shell, and with Chevron.

Mr. **Chisholm**. Exactly.

Senator **Ford**. Whatever it might be. So he can do most anything he wants to with the companies, and he does not come under the same pressure as the small businessman out there that has a service station—he is the dealer I deal with.

Mr. **Chisholm**. Well, he has more flexibility to buy from different people.

Senator **Ford**. Well, he has a better contract than the dealer then, does he not?

Mr. **Chisholm**. I do not know how you define "better".

Senator **Ford**. Well, he can do most anything he wants to do, according to what you just said.

Mr. **Chisholm**. No. I said he has more flexibility in terms of being able to operate; that he has strict contracts with each supplier that dictate what he can sell through those stations. Now, he may have more than one contract.

Senator **Ford**. Well, the dealer cannot have more than one contract, can he?

Mr. **Chisholm**. Not if it is branded Amoco or Chevron, or whatever it is.

Senator **Ford**. So he is more limited than your jobber.

Mr. **Chisholm**. In terms of that particular station. In terms of that particular station.

Senator FORD. Okay. I am beginning to see a little light at the end of the tunnel, here. Are you satisfied with the bargaining leverage of your members who are franchisees?

Mr. CHISHOLM. No.

Senator FORD. With respect to the oil companies?

Mr. CHISHOLM. No.

Senator FORD. Okay. What do you think should be your leverage to make you more equal, then?

Mr. CHISHOLM. In the past, senator, PMAA has supported amendments to the Petroleum Marketing Practices Act, and those amendments were embodied in bills that have been introduced in the House since 1984. In the last session it was H.R. 2406, and those bills embodied something in provisions that looked at the unique relationship that our people occupy and addressed some of the principal problems our members have in terms of negotiating with suppliers.

Many of the problems the dealers have talked about in negotiating with suppliers are the same problems I have. You get a contract, and the contract is a take-it-or-leave-it basis. The fair and reasonable provision only occurs at the end of a franchise agreement, and only on changes in the franchise agreement at that point in time.

The concern most of our members have is their supplier being fair and reasonable to them during the term of the contract or during the term of the franchise agreement, and it is not addressed. You made a comment earlier that we did not want to be protected. I did not mean to leave that impression. We do not view this as being protection. We do not view this as being helpful at all to us.

Senator FORD. But you have a problem with the major oil companies as your jobber being fair—you did say between contracts. Between the beginning of a contract and the beginning of a renewal. You say they are not fair to you there.

Mr. CHISHOLM. Well, I do not mean to say that in a broad brush and paint everybody with the same brush there, but certainly there are plenty of instances where our members would feel that they were not fair and reasonable during the terms of the contract.

Senator FORD. If you were in Mr. Probus's position, what would you be doing today?

Mr. CHISHOLM. If I were in Mr. Probus's position as a retail dealer, I would do exactly what he has done. I would have responded to changing market conditions; I would have gone to a convenience store—C-store—combination and I would have done essentially what he has done.

Senator FORD. Would you be sitting in his chair today, if you were in Mr. Probus's business?

Mr. CHISHOLM. I have great respect and admiration for Mr. Probus as a businessman. I am not sure I could match his ability as a businessman, but I would like to think that if I were in his position I would.

Senator FORD. All right, that takes care of that. Mr. Probus you are just in the wrong seat there. Or Mr. Chisholm is, one or the other.

Mr. PROBUS. If I were sitting over there I believe I would join us.

Senator **Ford**. Well, we are getting close. Senator Nickles would like to ask questions. I apologize, I have one more with Mr. Smith. But go ahead.

Senator **Nickles**. I just have a few questions and then I will be through. I appreciate the hearing, it has been rather informative and I was not in Congress, I think this passed a couple of years before I was elected to the Senate and so I have learned a little bit about this act during the course of the hearing.

To any of our witnesses, and just looking at what you—in this bill there are three amendments to the underlying act. The first one: what is the essence of the first amendment? Evidently it expands the number of contracts that would be covered. Is that correct? It expands it in what area? It says which is economically necessary to the operation of the franchise. Does that expand it? Well, I heard one of the statements—I think Mr. Smith, you mentioned that convenience stores were not covered. Is that correct?

Mr. **Smith**. I do not recall that, senator, but I could respond to your question I believe, on what the PMPA as I understand it includes: the trademark protection; in our case, the Chevron hallmark and its handling by our franchisee. It also includes a supply contract for branded gasolines. It also includes——

Senator **Nickles**. Which were not presently covered?

Mr. **Smith**. No. The things I am describing now are presently covered.

Senator **Nickles**. What does this expansion cover?

Mr. **Smith**. The expansion covers everything else that is not specified by the present PMPA, which is franchise, which is trademark, which is supply contract and which is the rental approach, the fair and equitable rental approach. Now that is what PMPA as I understand it is constrained to, and it has to do with terminations and renewals. Period. That is the extent of it.

Senator **Nickles**. Well, maybe I will ask Mr. Probus and his legal counsel. I am still trying to understand what the first amendment that deals with Section 2 under the bill, what does this do? It expands the definition, I guess, under "franchise".

Mr. **Daskal**. Senator, what the bill does in general is it says—first of all it states a flat rule: that you cannot terminate a franchise or nonrenew a franchise relationship which are two terms apart under the act. Now, let us say Emmett was in a different situation. Let us say he leased his convenience store—well, he does lease the store. But let us say that the franchisor came in and said, Okay we are going to get rid of this—how do we get rid of this guy? So what we will do——

Senator **Nickles**. Wait a minute—you are moving—I will take on the nonrenewal in certain cases, but I am still finding out what "economically necessary to operation of the franchise" is under the second section.

Mr. **Daskal**. What it would apply to is the cancellation of part of this bundle of agreements as to franchise that makes the franchisees continued right to sell gasoline basically valueless. In other words—for example, let us say he had a contract for tire battery and accessory sales, and the company cancels that. That is not something that is economically necessary. He can go out, he can get TBA from other sources.

But let us say you are at a facility like his where there is the convenience store, again, and they say we are going to cancel your convenience store agreement but we are going to leave you there to sell gasoline. The economic reality is the fact that he can only sell gasoline means that he is going to be economically evicted from the station in a matter of weeks or a couple of months.

What it is designed to do is to say that if you are going to terminate one of these agreements and the effect is to render your right to sell gasoline valueless, you have a right under the act to contest that termination as invalid.

Senator **Nickles**. So that could be—you mentioned convenience—what the same thing would be if you withdrew credit card purchases, or sales?

Mr. **Daskal**. On a discriminatory basis, yes. Those would be the two primary constituents. I think everything else would probably fall outside of the scope, and I do not think the amendment is intended——

Senator **Nickles**. Let me ask Mr. Smith or Mr. Chisholm: do you have any objection to that first section?

Mr. **Smith**. Yes. We have very significant objections. For example, we have a credit card system now, we do not have debit cards. We wanted to introduce the debit card feature in our credit cards. We could well be thwarted by a dealer or group of dealers taking this to court to find out if this is economically necessary, or is not economically necessary.

So it is the locking-in feature of this legislation that Section 1 would impose on us, or where it would lock in existing agreements and if we made a change—a voluntary change which we wanted to put in for a short period of time due to competitive conditions, such as a rebate program or whatever—we could well be locked in without having to go back to court for relief.

Senator **Nickles**. Okay. I heard most of the opposition at least from Mr. Chisholm, and I think Mr. Smith, to Section 3 of the bill which deals with the fair and reasonable standard which would be added. What do you see by the addition of that? Just the uncertainty of what that means, or do you see that as a loss of flexibility? What are your main reasons for opposing Section 3 of the bill?

Mr. **Chisholm**. I think our main reason is lack of certainty about what it means, and the language that was used by the courts in the *Munno* v. *Amoco* case about—Congress made the decision they did not want the courts to be involved as the rate review agency, or appropriate, because our members have no idea what they are going to be able to do or not be able to do under that fair and reasonable standard.

They are going to be put in the position of having to go to court at some point or trying to follow judicial interpretations; even that may be very difficult, because it is going to come down to a case-by-case basis—is what you are trying to do even though you are doing it to all your dealers, applied to this particular dealer, fair and reasonable? There is a lot of uncomfortableness in our members with that particular standard and the economic levers that will provide the dealers.

Senator **Nickles**. Mr. Probus, how would that additional couple of words give you any protection? How does that help you in Kentucky as far as operation of your station? Does that give you any additional real protection?

Mr. **Probus**. Being fair and reasonable would help everybody. If someone made a decision to terminate a part of my agreement—the food market, for example—it simply would not be fair and reasonable to do that. That would be economic termination of our contract.

Senator **Nickles**. Do you think that might happen now?

Mr. **Probus**. I really do not think it would happen now, with Shell Oil Company or with the people that I know.

Senator **Nickles**. Do you have a pretty good relationship with Shell? You do not really see that as happening? That is why I am wondering. Mr. Kane, on your circumstance you mentioned that you were mandated by Mobil to operate 24 hours a day. Evidently they are making a lot of stations do that. Do you think that is not fair and reasonable, and therefore would not be—are you still a Mobil dealer?

Mr. **Kane**. Yes, sir.

Senator **Nickles**. So you still are operating, so I guess you have not totally—you have not got—they threatened nonrenewal, but anyway, so I guess what you are saying if you could stick this in you could tell Mobil that that would not be fair and reasonable and would not be grounds for nonrenewal.

Mr. **Kane**. Most definitely I think I should exercise that right. I have the experience in the field to know what my business warrants and what I need for my business.

Senator **Ford**. Could I ask a question? Since we are messing around here a little bit with each other. Does it make a difference to you-all if it is between "reasonable" and "fair and reasonable"? You do not want either one of them, or would you take "reasonable" without "fair and reasonable"?

Mr. **Smith**. Senator, may I respond to that? I think it is safe to say that the API finds "fair and reasonable" in this context to be quite inappropriate. The counsel for the SSDA, Mr. Daskal—I think his view of the matter is quite different than the views our counsel have expressed to us, and I would like the opportunity if you would permit for Mr. Steffen, who has accompanied me here to give his opinion. I realize we do not want to make this hearing a legal debate, but this issue is of huge importance to us.

Senator **Ford**. Well that is fine, but—is that your counsel right there?

Mr. **Smith**. Yes, sir.

Senator **Ford**. The learned gentlemen with white hair. Is there a difference between "fair", between "reasonable", and the statement "fair and reasonable"? Are both of them just as objectionable as the other, and why?

Mr. **Steffen**. Both standards would be objectionable. What it does when you have either a reasonableness standard or a fair and reasonableness standard in this context is going to create a lot of problems. Any new marketing program that his supplier would want to come up with, whether it is a refiner program or a jobber program, he is going to be subjected to having that particular program blocked.

He is not going to know if he wants to respond competitively to changed marketing conditions, he wants to come up with a new program and that can be challenged. If he wants to have a debit card program, maybe some dealers do not like that.

Senator FORD. What is a debit card? I may not like it as a consumer either.

Mr. SMITH. Presumably these are features where you present a card and a card is a cash transaction, where it is taken out of your account. Many banks have debit cards and many consumers are now using debit cards as methods of payment. The point is, we respond as a franchise to competition, and what we are talking about here is being precluded.

Senator FORD. You all just use the float on that.

Senator NICKLES. We would lose the float with credit cards.

Mr. STEFFEN. We might find, for example that we put in this debit card and then maybe we would want to change it. Under the first amendment they are talking about, that might be part of the franchise relationship, and now we want to end that because maybe we have got some consumer reaction. But we could get into a lot of trouble with that simply because now everything is bound up in this "fair and reasonable" standard, and "fair and reasonable" is essentially a subjective standard. Every jury is going to look at it its own way. I mean, "fair and reasonable"——

Senator NICKLES. You see a lot of litigation coming with that type of standard?

Senator FORD. Well, "reasonable" is in two or three other parts of the bill. Do you object to all of them?

Mr. STEFFEN. Yes.

Senator FORD. You just flat out do not want the word "reasonable" or "fair and reasonable" in the legislation?

Mr. STEFFEN. In this context particularly as it applies to new programs. That is the most difficult situation and that is where the "fair and reasonable" does come in, in the amendments to this bill.

Senator FORD. One of the most fortunate things in my life is I did not go to law school. But I understand that courts make judicial history, and that in making judicial history they determine the definition, and those definitions are basically accepted at a certain point of what this term means. Is that reasonably true, or is that fair and reasonable?

Mr. STEFFEN. Well, I do not think you could make any generalizations about it. Certainly in some context, a rather general standard, you are quite correct, Senator, you can get more definite content over time. The concern we have with this particular amendment, however, it is sort of carte blanche. It is "fair and reasonable" as to any new program.

The very nature of what we are talking about is, someone is going to try out a new program, and there may be all sorts of different programs, and so it is going to be awfully difficult to build up a history on any one of these new programs.

Senator NICKLES. Let me ask you, Mr. Chairman, one final question, and that deals with the last amendment of the bill, the negotiation of the underlying lease. I guess if you do have a failure to renew, that the franchisee could go to the original owner. Mr. Smith or Mr. Chisholm, do you think that that is a good provision.

Mr. CHISHOLM. Senator Nickles, from our perspective this does not present nearly the same amount of problems as the "fair and reasonable" provision, particularly, presents. If we had our druthers we would not support it, but it does not raise the hackles nearly as much as the "fair and reasonable" standard does. We do not have specific concerns that we would level at that right now.

Senator NICKLES. You would not support it but you are not bothered by it?

Mr. CHISHOLM. Not in terms of practical application in most of our people's business because as a practical matter, again, with a jobber and the dealer working in the same local community, the jobber does not generally use that as a grounds for termination or nonrenewal of the dealer.

If there is a deal to be cut with the holder of that third-party lease generally the jobber is going to go in and cut it. He is not going to open it up to the dealer if there is some type of deal to be cut there. So that does not present the same type of problem that the other provision in the bill does.

Senator NICKLES. Mr. Smith, do you have opposition to that section as well?

Mr. SMITH. Yes, we do as it is written because it is totally unclear to us whether the dealer would have an entirely new lease with the lessor, the property owner, or whether we would somehow be retaining the liability or an obligation under the expiring lease, or a lease where we did not avail ourselves of an extension.

The most serious of these would be anything to do with the environmental liabilities. In many cases we have ground leases where we own the facilities, and they are complicated arrangements, usually. This section is quite unclear to us as to what position we might end up with. We might end up guaranteeing obligations of parties that enter an agreement where we are not members. So we have some real concerns about that.

We also have a concern generally, that this is a decree that we must keep supplying at that location, even though in our judgment long-term the reason we are not renewing the lease is that we do not think we should have a Chevron—in our case, a Chevron-branded premises—at that location. This amendment basically says, as I understand it, is that if the dealer is successful in making an agreement with a lessor and we do not want to make an agreement with the lessor, but if he is successful then we are obligated to take on a supply agreement. Of course, under PMPA once we take on that obligation we are there essentially forever, or as long as the dealer chooses to be there. So we think it reduces our latitude plus we are very concerned about the uncertainty of the whole area, as it is expressed by the amendment.

Senator NICKLES. One final question, Mr. Chairman. Mr. Smith, you mentioned basically opposition to all three amendments and it comes in this bill. Are there amendments that you would like to see in PMPA?

Mr. SMITH. No, Senator. I think that PMPA is—we are always going to have disagreements between parties, particularly in an industry as complicated as ours. We have disagreements with Chevron dealers. They have disagreements with us, one of the most notorious of which is always rent. We always say we are getting too little, they say they are paying too much.

Now we expect that in the normal commercial course of things. We think that PMPA, along with the marketplace, has created a reasonable balance. We talk to our dealers all the time about PMPA, and our application—our fair and equitable application—of rental programs and whatever else.

Again, this "fair and reasonable" thing while on the surface it sounds quite appealing, in fact it is going to hurt my—from Chevron's point of view these amendments would harm my franchise, and my franchise is both mine and the dealer's, and we would be less competitive as a group and PMPA companies in total would be less competitive relative to the rest of the industry.

This is going to hamstring, this fair and reasonable thing is moving so fast. We cannot go to court and wait for a year and a half on a marketing modification to one of our programs, and our dealers might be desperately in need of those programs.

Senator NICKLES. I appreciate that. One final thing. Mr. Probus, what percentage of all the service stations in the country does Service Station Dealers represent?

Mr. PROBUS. Well, I feel like we represent all the dealer-operated stations, but actual membership probably around 20,000.

Senator NICKLES. Which is what percentage?

Mr. PROBUS. Around 50 percent, I guess of the dealer-operated stations.

Senator NICKLES. Does that include convenience store-type things, and Joe's Get and Go?

Mr. PROBUS. Right. Every type.

Senator NICKLES. So about 50 percent of all the gas stations in the country are members of your organization?

Mr. PROBUS. No, about 50 percent of the dealer-operated stations.

Senator NICKLES. What percentage of all the gas stations?

Mr. PROBUS. Probably 35 percent of the total.

Senator NICKLES. Mr. Chairman, thank you very much.

Senator FORD. I have got a few more questions. Mr. Smith, what was your argument against good faith in 1978?

Mr. SMITH. Senator, I do not think I am able to respond. I was not involved in the proceedings in 1978.

Senator FORD. I wonder if your counsel was involved in that in 1978?

Mr. SMITH. I believe he was, sir.

Senator FORD. Well, I would like for him to tell me what the arguments were against "good faith" as it related to the PMPA.

Mr. STEFFEN. Well, "good faith" is used, as you know, Senator, in the PMPA.

Senator FORD. That is correct.

Mr. STEFFEN. There is a provision, for example, in PMPA, which says that parties must act in good faith in carrying out the terms of the franchise, and if they fail to do that, that can be a ground for termination or nonrenewal. But any time that a supplier, for example, says that a dealer or his franchise did something wrong, he must give under PMPA—that dealer, that franchisee—an opportunity to cure whatever the problem is. So the context of PMPA is designed to enable the parties to work together in that particular way.

Senator **Ford**. But were you not opposed to that language in 1978?

Mr. **Steffen**. I had no objection to using it in that context. None whatsoever. The question is——

Senator **Ford**. I must be getting old. My memory leaves me, I guess. I thought we had the same objections, basically, on "good faith" as we have now on "fair and reasonable."

Mr. **Steffen**. Well, it depends upon what context you are talking about. I do not recall that we had a general standard ever proposed for the failure to agree provision. What we are talking about on the "fair and reasonable" standard, "good faith" or whatever you want to talk about, is one particular provision of PMPA, which says that if the parties fail to reach an agreement then there is nonrenewal but there are a lot of safeguards in the statute as it presently exists.

You have got to have—the decision has to be a normal business judgment, and you cannot propose provisions designed to prevent renewal of the franchise. So I do not think we ever really had a broad "good faith" standard, at least as I recall, the way the thing went together. They have the failure to agree provision.

Senator **Ford**. Well, let me ask you this question then. How are you certain that your new programs that you want to institute are in good faith under present law?

Mr. **Steffen**. Well, remember the "good faith" obligation deals with existing provisions. So if you enter into an agreement you have got everyone—it is read into every contract: a duty to act in good faith in carrying out an existing agreement. The question really comes up——

Senator **Ford**. Well, you know, things pop up, new programmings, new debit cards or credit cards or whatever it might be that is new, that you did not think of it at the time you signed the contract. So that company decision to install that new card, is that "good faith", or could it be objected to under the "good faith" provision of the present law?

Mr. **Steffen**. If it was part of the franchise agreement. Credit card agreements, TBA agreements are not part of the basic structure of PMPA, which deals with your lease on the one hand and deals with your supply contract on the other. That is what it was trying to do, was to make sure that that basic relationship was properly established and that the rights were appropriately balanced.

But the legislative history of PMPA clearly indicates that the Congress did not want to second-guess business judgments of the parties. They wanted that to go forward and then they put in what they thought at the time were appropriate safeguards.

Senator **Ford**. I know the dealer must sign the contract and then that makes it binding or he is out of business, and you get you another dealer. I listened to Mr. Probus a moment ago when he said that major companies can require independent dealers to sign franchise contracts allowing them to bulldoze, I understand full-service stations. What kind of contract is that? What are we getting to in that?

Mr. Steffen. Well, I think that is an important point to consider. The way PMPA works in practice today is that a dealer, if he chooses to contest—supposing you have a new agreement that he does not like and he is going to have to sign something and he is worried about getting his station bulldozed. He can sign the new agreements under protest, and then he can contest in court.

He can get a temporary injunction under PMPA, and he can continue in operation, and it is not a heavy-risk situation for him, because he can in effect sign the agreements, he says, No, I do not really like these but I am signing them so now I want to challenge it.

So then he goes to the court and says, now I am going to get a temporary injunction. The court will then say, I want to preserve the status quo until we get this thing resolved. That is how it works today. That is how the actual practice under PMPA works.

Senator Ford. Well, let me ask you this. Are you an employee of Chevron or are you in private practice?

Mr. Steffen. No, I am with an outside law firm that advises Chevron.

Senator Ford. That is fine, I am not trying to get into personal—Well, Mr. Smith, how many attorneys do you have employed by Chevron in-house?

Mr. Smith. I am afraid I do not know that number.

Senator Ford. Would you say it is a hundred, or two hundred, or five hundred?

Mr. Smith. I do not think I can answer that question. We are a very large company. We operate with some in-house counsel and a lot of retained counsel.

Senator Ford. Well, you are the vice president of marketing. Do you have any in-house attorneys in your section?

Mr. Smith. No, sir, I do not.

Senator Ford. None whatsoever?

Mr. Smith. None reporting in my jurisdiction. Within Chevron-U.S.A. we go to in-house—a small group of in-house counsel—and then often if it is a specialized area, particularly in this arena, we have long done business with Mr. Steffen's firm.

Senator Ford. I respect good lawyers. Daddy told me a little knowledge of law is dangerous. You get you a good lawyer and stay with him. I have tried to do that. Why would one section of the bill, the relevant event section, pose a reasonable standard and another section not? Is this inconsistent—and that is under the present PMPA.

Mr. Steffen. Senator——

Senator Ford. This is Section 2802.

Mr. Steffen. You are referring to determinations whether it is an event that is relevant to a franchise relationship as a result of which termination of the franchise or nonrenewal——

Senator Ford. It is (b)(2)(c).

Mr. Steffen. Yes, and it uses the word "reasonable."

Senator Ford. Yes, sir.

Mr. Steffen. Well, that is the list of termination and nonrenewal section of PMPA. It deals with a number, and then there is what is often referred to as a list of the particular grounds on which nonrenewal or termination is proper, and such things as condemnation and the loss of a supplier's right to use the trademark; destruction of premises; failure, say, of the franchisee to pay on time; misbranding; adulteration; that is the basic section.

It does—what you have is a general standard here, and this is why I think we have to keep coming back to the context in which a word such as "reasonable" is being used. What they have done there is define a whole bunch of things, and what you get reasonable—this is sort of like what you were talking about earlier, Senator.

If you have got something to work with over time—and they have given us something to work with here. They have given us a whole list of things which they say are grounds, and so when you start defining what "reasonable" means you look to this list and say, well, it has got to be things like that. So that "reasonable" has content, and when you compare that with what is being proposed by this amendment they just say, "fair and reasonable." They do not give us anything to hang our hat on.

Senator Ford. But what we are working on here is the relevant event. It does not determine what is ~~reasonable~~, I do not think.

Mr. Steffen. Well the language, you are quite right, says it is relevant to the franchise relationship. In other words, they do not want termination on some sort of a white glove inspection basis and somebody has a provision in a contract which does not go to the guts of the franchise relationship, and somebody says, I want to terminate. This thing is a protection to the franchisee and says it has got to be relevant to what is basically involved in the franchise relationship. I think that is what the appropriate consideration is.

Senator Ford. I apologize for asking so many questions but I am trying to get to the point where I might be able to make some kind of an answer, because we are caught between a rock and a hard place, you know and the addition of "fair and reasonable" language for changes or additions to the franchise agreement I believe leaves intact more than 20 other grounds for nonrenewal.

Why does this language then concern you so much in this one particular area when we have got 20 other grounds for nonrenewal? It seems like you have just got a hat full of reasons that if one will not work you can lean on another one if you really want to take it away from a dealer.

Mr. Steffen. That is a very good question, senator, and I would respond this way. When you are dealing with a franchise relationship—when you are dealing with contracts—the normal thing you get under the Commercial Code is that parties sign up. They sign up for three years and then at the end of the three years——

Senator Ford. Is that the normal thing? Three years?

Mr. Steffen. Well that is under what we normally do, and in normal commercial transactions if you have a base term then it is sort of up to the parties to decide whether they want to go forward.

The particular amendment, the "fair and reasonable" amendment is dealing at the time of renewal. We have a changing market, and suppliers—both jobbers and refiners—want to be able to react to that market, and so they want to try out new things. If you have a "fair and reasonable" standard dealing with all the new proposals they would like to see introduced in the market, that can create problems for us in terms of being competitive with those who are not covered by PMPA.

A marketing vice president such as Mr. Smith has got to worry that if he starts something new he does not want to get caught up in a lot of interpretation questions, and wondering whether he can do this. He needs a certain amount of certainty so that he can be sure that he can go ahead with his program without getting bogged down in litigation.

Senator FORD. But there are two sides to the question, and two sides to the coin. He wants certainty and the fellow he is dealing with would like to have a little certainty, too.

Let me tell you why I got so interested in this little piece of legislation. Back during the dealers' day in court—and it had nothing to do with Chevron, it was another brand—one of the finest fellows in my home town had this contract for 29 years with this one oil company. In fact, it ran many years without a signed contract. It was a verbal contract—it was just one man's word. It kept right on going.

He worked his heart out to be sure that everybody that called got service, that his business improved. So one day they just said, "Thirty days and out. You are out of business." That was before we got active. "And we are not going to sign a new contract." Well, they owned the land, you know, and he had put some effort into the building and that sort of thing.

To make a long story short, they bulldozed down all his grease racks and washing areas, mechanical area in the back—all those things; just bulldozed all that down and put a little glass cage up for one employee and you had self-service.

Forty employees went down the drain, and one of the finest people in our community—everybody liked him—and I want to tell you it was awful hard for many of us to buy that gasoline around there for a long, long time. In fact we did not even buy it in town, we went and bought it out of town. But it was just one of those things, all of a sudden, "Thirty days and out." Bam, he was gone—bulldozed it, put in self-service. You had three employees, and lost 37, and they were all out looking for jobs.

Maybe today with plant closing it would not have worked on service stations but they just gave them 30 days and bam, they were gone. He did not hardly have time to get his own equipment out. I just resented that. I was not part of the contract, but I had good service. This fellow worked hard, and he was not 24 hours a day, he ran the business like he wanted to. It was his, and the company was satisfied until we went into self-service.

Sure, he had a right to do it. I mean there was no question about the company's right to do that. I do not question that at all. I just question the method, and I wanted to slow that up a bit because the fellow did not want to go out of business. He was doing good and the company was doing good. People were being served, and that company had a good reputation in town because this one fellow ran the service station. They lost their image, 37 people lost their job, and it was a sore spot and still is.

We can talk about it today and it will come up in conversation, and that was several years ago. It was not Chevron and so I will leave them out. I do not know that they have done anything in my area, but that got to me. I guess that is a personal thing and it becomes emotional, but we vote around here 75 percent emotional and I am kind of for the little fellow, or maybe a little bit more than kind of for him.

Mr. STEFFEN. The kind of situation you described I think is one of the reasons why we had PMPA in the first place. The basic premise, as Mr. Chisholm said, behind PMPA is to prevent arbitrary terminations and nonrenewals. That is exactly what PMPA was designed to do.

Senator FORD. In fact, if it happened today under PMPA what would have been that dealer's options?

Mr. STEFFEN. If he felt he was being terminated unfairly he could take the matter to court.

Senator FORD. Well, he could have done that some time a ago, could he not, under the original, before we had PMPA?

Mr. STEFFEN. Yes. But the protections under PMPA are a lot greater. He can get a preliminary injunction on this. The preliminary injunction standards are looser than the normal ones in this kind of case. He does not have to show ultimate success on the merits, which is the normal one. It is just, "Is it a likely ground of litigation?" That is what the injunctive standard is under PMPA, so the PMPA--there is no question about it—was a remedial statute.

Senator FORD. It gave some relief.

Mr. STEFFEN. Yes.

Senator FORD. In other words, he could stay in business until the case was settled. He could have done it earlier, too if the court had given an injunction against termination of the contract.

Mr. DASKAL. Senator, this is one of the best examples of where the PMPA has not worked and it has totally been interpreted completely out of accord with its legislative intent. It is the area of public conversions.

Now, the act contains a specific clause dealing with material alteration, and what the court did in the Baldauf case, for example, was to say that okay, you the company—and Chevron has it in their lease—can insert a clause saying that you agree to allow us to bulldoze an existing facility then with 30 days notice. But what it does is basically force you to agree to material alteration ahead of time.

Now, as the folks at the end of the table well know, that in their own home town of San Francisco an ordinance was enacted—a local zoning ordinance—was enacted to give the public a right to notice, and to participate in a zoning hearing to determine whether or not they wanted a full-service facility converted like what happened in your home town. Chevron fought it tooth and nail, but it was enacted anyway.

But you know we have heard a lot of talk, for example, about the words "reasonable" and how much it troubles the folks at the end of the table. I just find that a little bit mistifying for several reasons. I just had the occasion to review a lease from one of Phil's members the other day, and I counted the word "reasonable" in there 54 times, and I would think that if they are having a little difficulty with the word, "reasonable" in the statute, I would say my folks are probably having a little difficulty with determining what "reasonable" means there.

But there is one fact that has sort of been escaped. You have heard Mr. Steffen talk about the idea that the dealer can go to court and get an injunction. That is the only reason Mr. Kane is still here today, is because he has an injunction. But that does not deal with the ultimate resolution of the case, and all this talk about endless litigation ignores one fundamental thing.

The PMPA deals with standards for termination or nonrenewal. It is not like a state franchise law like Connecticut's, that says you cannot impose unreasonable standards of performance, or the Wisconsin Fair Dealership Act, or the New Jersey State Franchise Law. This act only deals with termination or nonrenewal.

So if Mr. Smith's company comes up with some proposed changes and my guy says, I do not like them, he can go to court but he has got to realize what his up-side and his down-side is. His up-side is this: if he wins, he retains the station. He stays in there. He does not get any big windfall damage award, because under PMPA exemplary damages do not even go to a jury. Another area where PMPA is unique.

If he wins though, he has still got to deal with the same franchisor and it is still his partner. He is going to find things like, repairs to his station are not going to be done as quickly; maybe that a load of gasoline is not going to get there as fast, and things of that nature. But if he loses, he is gone. It is over. A lifetime of business may be wiped out forever.

That is a very significant down-side risk that nothing in this bill alters, and that is why I have such a great deal of difficulty listening to some of the stuff that has been thrown out about how service-station dealers are going to clog the courts with this thing. Before this act was enacted you had a number of laws that said they would prohibit unreasonable standards of performance in a franchise agreement, for example.

Under that sort of franchise law any other franchisee in the country—a Burger King, a McDonald's, for example, under the Wisconsin Act—they can go to court, and they can contest so-called unreasonable standards of performance and they do not have to put their businesses on the line in order to do that. Nothing in this bill changes that.

You know, we have talked about balance, and that is another area where the original intent of this statute has become totally perverted. There is no balance, it is no more balanced than the Leaning Tower of Pisa. Basically, the franchisor imposes the changes and we have to agree or we are gone. It is a very simple game. Ten years later after the enactment of PMPA, we still do not have the negotiating power. It is still, "Take it or leave it".

One of the examples we gave in the testimony, Chevron talked about how we talk to our dealers, we talk to dealer advisory councils. For example, we had a dealer advisory council ask the company well, can we review our franchises ahead of time and the company said well, we will try to arrange that. But if your object is to give it to an attorney for review you are wasting your time and money, because the franchise agreements are non-negotiable. And that is the bottom line.

What we are saying is this: we are the folks who have the hands-on experience downstream, and we should have the right to negotiate an agreement and to have a say, as Mr. Kane says, in how the business is being run. You heard talk about—I would like to address the underlying lease amendment, for example.

We heard all this talk about all these environmental considerations, and things of that nature, and that we do not nonrenew relationships unless they are uneconomical, for example. The oil companies have a book that lists all the PMPA cases that is given out to their armies of attorneys, and in the underlying lease area they talk about a case of *O'Share* v. *Shell*, and in that case—not to pick on Shell because if everybody was as good as Shell there would be a lot less problems in the industry.

But in that case, you know the company terminated a guy for failure to—because of the expiration of the underlying lease, which is an event that is relevant that makes termination presumptively reasonable, okay. Now, the company's real motivation was revealed when the court also held that the dealer did not have the PMPA right to get a new franchise on a station that the company was going to build and company-operate across the street.

All the underlying lease amendment does is this: if our guy goes out to the landowner and gets the right to stay at the location, the company has to honor the franchise agreement for its duration. If at the end of the relationship it is uneconomical, fine. That is separate grounds for termination—for nonrenewal under Section (b)(3)(D).

I mean, they are the ones who decided they were going to give the guy a franchise for, say, three years, and if the underlying lease expires in the middle of that term that is grounds for termination. All we are saying is, if he goes out and makes his own deal that the company has to honor—live up to the three-year agreement they originally imposed on him to begin with.

Senator FORD. Mr. Smith, what is wrong with that?

Mr. SMITH. I am not sure that I could really get into a debate on the legal side of the equation.

Senator FORD. I am not a lawyer so you do not have to get into a legal debate with me. It just seems like it is the word between two people. You have a contract with me for three years, and the lease—you have a lease, a ground lease and that expires, and I go out and make arrangements with the ground lease fellow to keep it for the balance of my contract with you, and I make those kind of arrangements. What is wrong with you living up to the rest of your contract?

Mr. SMITH. We entered into—for example, when we entered into a ground lease we are not owners, we enter into a contract for use of that site for that specified period of time. When that expires, it is reasonable that there is a new decision to be made by us. We expected down the road that a new decision would be made, just as if you rented an apartment with a five year lease. You would expect five years from now you would have a new decision to make, and in this case a new decision is being made by us not to renew.

Implicit in that is that while that location may have served our network purposes appropriately at the time we entered into the lease, we now have an opportunity to re-think that decision relative to the new marketplace. We might say, no, we would just as soon not be represented there with that mode of operation, because in our overall franchise approach that did not fit our plans, and we think we should have that privilege at the end of that contract period.

Senator **Ford**. Why would you go ahead and give a dealer a contract beyond the time of the land lease, knowing full-well that if you do not renew that lease that the dealer is out?

Mr. **Smith**. We do not, sir. We do not enter into contracts.

Senator **Ford**. Well, why do we need this negotiation of underlying lease?

Mr. **Smith**. Well, we do not enter into contracts with our dealers that are longer. In fact, in every case they are shorter than our lease terms, so we are never in a situation——

Senator **Ford**. You would not have any objection then, to the underlying lease provision?

Mr. **Smith**. If the dealer, at the expiration of the lease arrangement we have wishes to go and we do not wish to renew, and that dealer goes to the landowner and cuts his own deal, which they do now, that is fine with us. We do not have any objection to that.

We just do not want to carry over our existing arrangement and then us being responsible for the obligations under that arrangement. We want our lease to end, his to start, and then we decide together—he decides and we decide—whether we want to enter into a supply agreement. That is the way we do it now.

Senator **Ford**. So then, if you make a lease with a dealer today, that land lease would not expire before that franchisee turn around.

Mr. **Smith**. That is absolutely correct, sir.

Senator **Ford**. As far as Chevron is concerned you would not worry about the underlying lease, subject to the advice of your counsel.

Mr. **Smith**. I think it is safe to say, I must keep reminding myself I am testifying on behalf of API, and I can only assure you at this point that that is Chevron's practice.

Senator **Ford**. That is fine. I understand that. We all have personal opinions, and then we represent associations and it is just like being a member of ACLU, you know? [Laughter.]

Sometimes we agree with them, sometimes we do not. Like the Attorney General of the United States—he resigned his membership in ACLU.

So when you do that, then you have your own personal opinion. So I have no problems with you testifying as to what Chevron does. That was my question and you responded adequately, and I think properly. I hope that counsel does not object when you gave that caveat.

Mr. **Steffen**. No problem.

Senator **Ford**. Good. Like Daddy said, I am sure you are a good lawyer. I do not have any other questions, and let me say this: If you have any further statements you want to make to put in the record, if I could have those within 24 hours—I am putting a little short notice on you, but if you have any additional information based upon the questions that have been asked today—Mr. Smith, Mr. Chisholm, Mr. Probus—even you, Mr. Kane if you want to submit something for the record. If I could have that by the close of business here tomorrow, I would appreciate it very much.

I know it is short notice, but we are getting ready to sine die here before long and I would like to get it into the record and we need a little lead time in order to put that in. So if you could do that—it looks like I am by my lonesome, so if I am by my lonesome I am in charge. We are adjourned.

There have been a lot of other statements that have been sent in, and we will submit those as part of the record.

[Whereupon, at 11:25 a.m., the committee was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

American Petroleum Institute
1220 L Street, Northwest
Washington, D.C. 20005
202-682-8000

October 5, 1988

The Honorable
Wendell Ford
United States Senate
Washington, D.C. 20510

Dear Senator Ford:

I wanted to avail myself of your offer to keep the record open an additional 24 hours, because I wish to correct a reference on Page 2 of my statement indicating the bill applies to contracts "economically necessary to the operation" of the leased marketing premises. This language more accurately applies to H.R. 1842 as S. 2179 incorporates the broader language, "economically necessary to the operation of the franchise." This broader definition in S. 2179 does not, however, make the bill less onerous.

We also feel strongly that the "fair and reasonable" provision, which sounds innocuous and even appealing, is in reality a prescription for endless litigation and competitive disadvantage for many of the service station dealers it purports to help.

As I pointed out at the hearing, to serve the consumer, the gasoline marketer must be able to provide innovative product and service mixes quickly and in response to competition. Under the Petroleum Marketing Practices Act (PMPA), as presently constituted, we have that opportunity. However, we will not be able to respond quickly or, perhaps not at all, under the "fair and reasonable" test proposed in S. 2179.

In contrast to the language in the current law, the terms "fair and reasonable" in the bill are not commonplace in federal, state or local law. Courts would be compelled, on a case-by-case basis, to second guess the business judgement underlying a franchisor's decisions. Franchisors would understandably be somewhat more reluctant to innovate or make business based changes because of the constant threat of protracted litigation.

Equally, if not more important, our ability to respond to other competitors not subject to S. 2179 would be restricted for the same reasons. The franchisors subject to PMPA -- and their dealers -- would be at a severe competitive disadvantage

The Honorable Wendell Ford
October 5, 1988
Page 2

relative to other gasoline marketers not covered by the law. Blocking innovation and competitive response for one segment of the gasoline marketing community cannot work in the interest of either lessee dealers or, more importantly, consumers.

I do appreciate the opportunity to bring the views of the American Petroleum Institute and my company before the Subcommittee. I also wish to thank both you and Senator Nickles for your courtesy at the hearing, and I hope other members of the Subcommittee will read my entire statement on S. 2179, a copy of which is attached.

Sincerely,

David C. Smith

David C. Smith
Vice President, Marketing
Chevron U.S.A.

cc: Sens. Metzenbaum, Bradley,
Bingaman, Fowler, Nickles,
Weicker, Evans

Chevron

Chevron U.S.A. Inc.
1700 K Street, N.W., Washington, DC 20006

October 5, 1988

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Energy Regulation and Conservation
Washington, D.C. 20510

Dear Mr. Chairman:

Chevron U.S.A. appreciates very much the opportunity to supplement the record of the hearing on S.2179, the bill proposing amendments to the Petroleum Marketing Practices Act.

The dealer witness representing the Service Station Dealers of America commented that Chevron's Atlanta office had threatened Chevron jobbers with termination for the "crime" of selling gasoline to Chevron dealers at 15¢ below the price Chevron charges dealers. In addition, the witness claimed that Chevron had threatened its dealers with termination for the "crime" of offering lower prices to their customers.

A copy of Chevron U.S.A.'s letter to its jobbers in Atlanta is enclosed. This letter simply advises jobbers that Chevron has supply contracts with its dealers requiring them to purchase directly from Chevron such quantities of Chevron gasoline as needed to meet consumer demand for Chevron gasoline.

Chevron frequently suggests resale prices to its dealers. In my experience, it is invariably the case that Chevron suggests lower prices than the dealer is currently charging. The decision, of course, is for the dealer to make. I can state categorically that I know of no situation where Chevron has threatened any dealer in Atlanta or anywhere else with termination for offering lower prices to customers.

Thank you for permitting Chevron to set the record straight on this matter. I also want to thank you personally for the courtesy you showed me at yesterday's hearing.

Sincerely,

David C. Smith

David C. Smith
Vice President, Marketing
Chevron U.S.A. Inc.

Encl.

cc: The Honorable Wendell H. Ford
The Honorable Don Nickles

Chevron U.S.A. Inc.
P. O. Box 1706, Atlanta, GA 30301

February 12, 1986

Dear Chevron Jobber:

It has recently come to our attention that some Chevron jobbers have been soliciting the sale of, or have in fact sold, Chevron products to Chevron dealers who have direct Supply Contracts with Chevron. The purpose of this letter is simply to remind all Chevron branded jobbers that the occurrence of such activity may jeopardize the jobber's relationship with Chevron.

While Chevron dealers may purchase non-Chevron motor fuels from others (subject to the dealer fulfilling his obligations under his Supply Contract with Chevron continuously to offer for sale all grades of Chevron motor fuels), Chevron's Supply Contracts with both its two-party and three-party dealers require that the dealer purchase from Chevron all Chevron motor fuels necessary to serve demand for Chevron motor fuels at the dealer's station. Hence, any purchase of Chevron motor fuels by any direct supplied Chevron dealer from a Chevron jobber is a breach of the dealer's Supply Contract with Chevron.

Any sale by a jobber of Chevron motor fuels to any Chevron dealer who is now a party to a Supply Contract with Chevron constitutes a wrongful interference by the jobber with Chevron's contracts with those dealers, and may result in termination of the jobber agreement with Chevron. The Branded Jobber Petroleum Products Agreement permits termination by Chevron if "jobber knowingly induces the breach by a third party of a contract between Chevron and the third party."

If you have any questions whether any particular service station selling Chevron gasolines has a direct Supply Contract with Chevron, please contact me.

Very truly yours,

CHEVRON U.S.A. INC.

By:
S. P. WILLIAMS
Wholesale Manager

bcc: Reseller Representatives
Area Managers - Wholesale

(Letter mailed to all
Branded Jobbers - 2/12/86.)

EXXON COMPANY, U.S.A.
POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180

MARKETING DEPARTMENT

R.P. LARKINS
VICE PRESIDENT

October 5, 1988

The Honorable Wendell H. Ford
Energy and Natural Resources Committee
SR-173A Russell Senate Office Building
Washington, D.C. 20510-1701

Dear Senator Ford:

On September 29, 1988, I wrote you and members of the Energy Regulation and Conservation Subcommittee of the Energy and Natural Resources Committee expressing Exxon's opposition to the amendments to the Petroleum Marketing Practices Act contained in Senate Bill 2179. I respectfully request that the letter and its attachment be included in the record of the October hearing on S. 2179.

Sincerely,

R. Larkins

RPL:ma
DMS776

A DIVISION OF EXXON CORPORATION

EXXON COMPANY, U.S.A.
POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180

MARKETING DEPARTMENT

R. P. LARKINS
VICE PRESIDENT

September 29, 1988

The Honorable Howard Metzenbaum
Chairman
Subcommittee on Energy Regulation
and Conservation
SR-140 Russell Senate Office Building
Washington, D.C. 20510-3502

Dear Chairman Metzenbaum:

Your Subcommittee has before it Senate Bill 2179, which would amend the Petroleum Marketing Practices Act passed by Congress in 1978. Exxon is opposed to these amendments because they represent a serious departure from the delicate balance between the rights of suppliers, dealers and distributors created when the original bill was enacted. I testified against an identical bill before the House Energy and Power Subcommittee as a representative of the American Petroleum Institute in February, 1988, and have attached a copy of my written submission for your reference.

At that time, I stated that this measure could seriously harm all participants in the petroleum marketplace - consumers, franchisors and franchisees alike - by impeding desirable changes in franchising operations. The proposed amendments would also discourage the establishment of new franchises and result in a significant and unnecessary increase in PMPA litigation.

On the surface the changes proposed by Sections 2 and 3 of these amendments may not appear to be unreasonable; however, they would introduce a great deal of uncertainty into the franchise relationship. Since courts would have to resolve these uncertainties on a case by case basis, franchisors would be reluctant to adopt innovations in such areas as insurance, credit cards, financing of equipment, or purchase and sale of items such as tires and batteries. Further, the introduction of competitive techniques such as cash discounts, quick lube outlets, automated point of sale equipment, extended repair facilities and convenience products would become difficult to implement. The resulting marketplace stagnation would be to the detriment of consumers, and in our view, of dealers as well.

Section 4 of the amendments would make franchisors reluctant to enter into new franchise agreements because it would reduce their ability to limit the term of the franchise agreement to the duration of any base lease the franchisor may hold on the property. Suppliers do not construct stations to last forever, rather their economic lives are determined by market and supply conditions as well as consumer demand. The continued threat of involuntary franchise extensions presented by this section could discourage franchisors from establishing new franchises, particularly those involving an underlying lease.

Finally, by replacing the certainty and balance that currently exists with the uncertainty and subjectivity these amendments would cause, they open the door to increased litigation and decreased choice for the consumer. Proponents of this bill claim it will provide them needed protection from the alleged unfair activities of suppliers and allow them to remain in the service station business. In our view, they would only protect the inefficient operator who was unwilling to make the changes required to meet consumers' needs in today's highly competitive marketplace.

In summary, Exxon believes that existing laws and competition are adequate to maintain the balance between franchisors and franchisees that Congress recognized when the original measure was enacted. The changes proposed by Senate Bill 2179 destroy this balance and should be rejected.

Sincerely,

R. Larkins

RPL:kc
Attachment
dms784

bc: Mr. J. D. Adkins
Mr. J. R. Allred
Mr. W. H. Cash, III
Mr. F. J. Devlin
Mr. R. V. Hansen
Mr. J. F. Marcogliese
Mr. D. L. McLallen
Mr. M. C. Quinn
Mr. M. E. Rollins
Mr. J. B. Sallman, Jr.
Mr. M. O. Waldman

Statement of R. P. Larkins
Marketing Vice President, Exxon Company U.S.A.
on behalf of the
American Petroleum Institute
before the
Energy and Power Subcommittee
of the
U.S. House of Representatives
H.R. 1842 - on PMPA Amendments
February 24, 1988

Mr. Chairman, members of the subcommittee, I am Bob Larkins, Marketing Vice President of Exxon Company, U.S.A. I am here on behalf of the American Petroleum Institute (API) and its member companies to express opposition to the proposed amendments to the Petroleum Marketing Practices Act contained in HR1842. API is an industry trade association composed of over 200 corporate and approximately 4500 individual members involved in all phases of the petroleum industry.

Radical Change - Not Fine Tuning

PMPA as passed in 1978 was the result of a significant and sincere effort by Congress to balance the property rights of suppliers with the perceived need of jobbers and dealers for additional protection beyond that provided by general business and antitrust law. While these proposed amendments are frequently portrayed as "fine tuning", in reality, they represent a serious and radical departure from this carefully crafted approach by Congress. HR1842 would harm consumers, franchisors and franchisees alike by impeding desirable changes in franchise operations, discouraging establishment of new franchises and resulting in a significant and unnecessary increase and protraction of PMPA litigation.

Trends Beneficial To Consumers and Efficient Marketers

The trends since decontrol which have been used by the bill's proponents to support the need for this legislation, such as the increase of service stations offering convenience products and self service, are in reality the signs of a healthy and competitive marketplace responding to changing consumer demands. While there has been a steady reduction in the number of wholesale and retail outlets to serve declining and now currently stable gasoline demand, these changes have resulted in a steady increase in efficiency due to the average higher volume sold by the remaining outlets. Over the same period the combined market share of branded independent dealers and distributors has remained virtually unchanged.

Amendments Unnecessary and Anti-Competitive

HR1842 would essentially destroy the balance struck in PMPA and replace it with a biased statute which is unnecessary, anti-competitive and harmful. The provisions of this bill effectively limit the ability of suppliers to terminate or non-renew existing contracts on currently lawful and, we believe, appropriate grounds. The end result of this would be a frustration or preclusion of innovation, efficiency and greater customer service in gasoline marketing.

Section 2

Section 2 of the bill expands the definition of "franchise" to include any contract "economically necessary to the operation of the leased marketing premises." While this on the surface may not appear unreasonable, it would nevertheless require the courts to determine on a case by case basis what is "economically necessary" and what is not. This would result in further litigation and confusion, contrary to the intent of Congress in passing PMPA in 1978. The proposed broadening of the definition fails to take into account the essential purpose of PMPA's enactment - to protect a franchisee's security in the "trademark license" granted by the franchisor while maintaining the flexibility to which the owner of the trademark must have a right.

For example, franchisors would be discouraged from offering ancillary benefits or programs such as rent incentives, insurance programs, or credit card agreements. Under the change contemplated by HR 1842 these programs could only be terminated or changed as part of a broader termination or non-renewal on grounds specified under PMPA

This provision would also impede more efficient and innovative marketing changes in franchise operations, thereby harming consumers. Recent examples would be the cash discount offered by some marketers and the debit card or debit feature other marketers have added to their credit card. Gasoline marketing is a vigorously competitive business, with a wide variety of strategies and offerings and a large number of competitors. This environment should be encouraged to continue. The change in the definition of "franchise" would discourage contracts covering the sale of non-gasoline items, such as the financing of equipment, and the purchase and sale of tires, batteries or automotive equipment. Under this provision, such contracts would be subject to the same restrictions as the lease and product sales agreement.

Section 3

Section 3 of the bill requires all franchise agreement changes to be "fair and reasonable" if failure to agree to those changes is to be used as a reason for nonrenewal. Current law already requires that such changes be made in "good faith and in the normal course of business" and not for the purpose of preventing renewal. In contrast to the current law, the terms "fair and reasonable" are not easily defined and are likely to lead to uneven interpretation by various courts.

Once again, on the surface, the change proposed by HR1842 may not appear to be unreasonable, but it would have a chilling effect on innovation in gasoline marketing, resulting in less competition and resulting in decreased service to the consumer. This provision would replace the standards currently required by PMPA, objective standards which are understood by franchisors and franchisees and have been upheld by the courts, with a vague and undefined "fair and reasonable" standard. The courts would be compelled, on a case by case basis, to second guess the business judgment of franchisor decisions. Franchisors would naturally be reluctant to be innovative in non company operated stations because of the threat of protracted litigation. In effect, current contract terms and methods of operation would be frozen, at least until courts defined "fair and reasonable."

Even then, uncertainty would continue to reign due to the case-specific nature of such a standard. What was considered to be "economically necessary" or "fair and reasonable" to a jury in one part of the country might not be to jury somewhere else. Suppliers could find it impossible to know in advance whether changes in marketing activities could be implemented nationwide.

By replacing the certainty that exists under the current provisions of PMPA with the uncertainty these amendments would cause, the bill would open the door to increased litigation and decreased choices for the customer. It would protect the inefficient operator who was unwilling to make the changes necessary to compete effectively in today's highly competitive marketplace.

Section 4

Finally, Section 4 of the bill requires the franchisor to continue supplying the franchisee with product if the franchisee is able to negotiate a lease with a third party landowner or lessor of the underlying lease, even though the franchisor's own lease on that property, and on which the franchise was initiated, has expired. In effect this forces the continuation of the franchise through a contract to which the franchisor is not a party. Currently PMPA allows expiration of the base lease to be used as grounds for termination or non-renewal provided the franchisee has been notified in advance that such an event might occur.

This proposed revision would reduce a franchisor's flexibility to limit the term of a franchise agreement to the duration of the base lease. Franchisors currently construct and lease stations for periods warranted by customer demand and marketing plans. The continuing threat of involuntary franchise extensions presented by this revision could discourage franchisors from establishing new franchises, particularly those involving an underlying lease.

Conclusion

Proponents of this bill claim they need additional protection from the alleged unfair activities of suppliers and that these changes will provide them with such protection and allow them to remain in the service station business. In the long term, by reducing the flexibility and competitiveness of suppliers who are subject to PMPA, the dealers of those suppliers may actually be harmed. Their suppliers will be unable to respond to changing consumer preferences as rapidly as those companies which are not subject to PMPA. The end result of failure to innovate and change in a changing market is loss of business. If the supplier cannot keep up with the innovations of its competitors, its dealers will be less competitive as well. Establishing barriers to change is not in the long term interest of the very dealers who seek this legislation.

We believe existing laws and competition in today's marketplace are providing an adequate balance between the rights of suppliers and their branded customers. HR 1842 is harmful and unnecessary legislation which we oppose. Such radical changes in the existing PMPA would harm consumers, suppliers and dealers, increase litigation and undermine the intent of Congress in enacting the law in 1978. When PMPA was enacted, the report accompanying the bill stated:

> "Legislation in this subject area requires recognition of the legitimate needs of a franchisor to be able to terminate a franchise or not renew a franchise relationship based upon certain actions of the franchisee including certain failures to comply with contractual obligations or upon certain changes in circumstances. Particularly important is that legislation dealing with this subject recognizes the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences."

The changes proposed by HR1842 destroy this flexibility and should be rejected.

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NCPR National Coalition of Petroleum Retailers, Inc.

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POSITION PAPER

NATIONAL COALITION OF PETROLEUM RETAILERS

BEFORE THE

SUBCOMMITTEE ON ENERGY REGULATION AND CONSERVATION

SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

WASHINGTON, D.C.

PUBLIC HEARING
OCTOBER 4, 1988

SUBJECT: S. 2179 - A BILL TO AMEND THE PETROLEUM MARKETING PRACTICES ACT.

Mr. Chairman, on behalf of the National Coalition of Petroleum Retailers (NCPR) we commend you for providing this opportunity.

The Coalition represents six (6) of the ten (10) largest gasoline sales volume states in the United States, five (5) of which have state-wide memberships. Historically, we have been and are today among the largest and strongest gasoline dealer associations in the Nation. NCPR represents a significant number of gasoline retail dealers affected by the proposed amendments to the Petroleum Marketing Practices Act (there are approximately 23,000 gasoline retail service stations located in NCPR member-affiliate states, as defined and determined by the U.S. Census Bureau).

It is the position of the Coalition that S.2179 is a Bill that will enable the Courts to carry out Congress intent 1/ to correct burdensome clauses in agreements which are continuing to be used by franchisors to unfairly constructively terminate, cancel or non-renew retail gasoline franchises.

Prompt committee action and passage of S.2179 is requested. The Petroleum Marketing Practices Act (PMPA) is "broke" and it needs fixing.

A decade has lapsed since PMPA was passed by the Congress. The past several years Congressional consideration 2/ of our continuing need for mandatory fairness has been aired before Congressional Committees. Its time for action.

The Courts have emasculated the protection intended by Congress and therefore created the need for us to return to plea for the Amendments contained in S.2179. If franchisors are allowed to avoid PMPA through constructive termination by way of "uniform" unreasonable and economically unfeasible terms and conditions that must be complied with by our members the statute will eventually become meaningless. Ten long years of court cases have established a credible, factual and believable track record. A study of that record confirms there is a need for further Congressional action. Congress should stop unreasonable and unfair imposition of minimum gallonage purchase requirements, use of enormous rent hikes, and excessive hours of operation requirements, etc. which franchisors are continuing to use to force our members out of the marketplace.

1/ Original passage of PMPA, June 19, 1978
2/ H.R. 1842 (1988), previously introduced as H.R.2406 and H.R. 2338

The demise of more and more small businesses in gasoline retail marketing can and will lead to a lessening of competition. A lessening of competition will bring assured higher prices for motorists of this Nation. And there is a destruction of small business opportunities in great numbers.

Some franchisors have drafted and are using contracts and agreements under which, for all intent and purposes, they have removed many retailers from any protection under PMPA intended by the Congress 3/. With the clever use of words the oil companies have found a way to side-step compliance with PMPA. But first they must terminate, cancel and non-renew existing retailers by imposing so called good faith business reasoned uniformly applied terms and conditions that if followed does not permit our members to economically survive. Thus, this avoidance of PMPA is with the use of court established (and approved) "uniform" terms and conditions regardless of the fact that such are unreasonable and means a constructive termination.

3/ See Farm Stores, Inc. v. Texaco, Inc. 577 F. 2d 1335 (11th Cir. 1985) Note -Attached Exhibit A is a prepared "Petition for Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit" that was withdrawn. Texaco's settlement offer stopped final adjudication of this case. It's substance is relative to the need for Congress to express its intent to provide relief for our members that would be afforded with passage of H.R. 1842 and stop the Change-over to presently court sanctioned franchises that are outside the protection of PMPA. See also Sigmon v. Widenhouse Service, Inc., 638 F. Supp. 808 (M.D. N.C. 1986).

By giving the Courts new direction for drawing conclusions based on evidence that certain franchisor unilaterally imposed terms and conditions are unfair and unreasonable ... the courts can balance equity when dealing with certain issues including but not limited to the following:

1) Minimum Gallon Purchase Requirements; (Malone v. Crown Central Petroleum Corp., 474 F. Supp. 306 (D. MD. 1979)

2) Mandatory Operating Hours Stipulations; (Crown Central Petroleum Corp. v. Waldman, 515 F. Supp. 477 (M.D. PA 1981)

3) Aggressive Increases in Occupancy Costs; (Bellmore v. Mobil Oil Corp., 524 F. Supps. 850 (D. Conn. 1981)

4) Potentially Coercive Effects of Short Franchise Renewal Periods (Month to month, etc.) coupled with impending threats of termination or Nonrenewal. (Halder v. Standard Oil Company 642 F 2d 107 (5th Cir. 1981)

5. Equally applied mistreating uniform practices increasing franchise's operating expenses the courts found to be permissible - rents and hours of operation; Brodhagen, Max v. Phillips Petroleum Company, Civ. Act No. 81-C-127 (E.D. Wisc. 3-2631); Meyer v. Amerada Hess Corp., 541 F. Supp. 321 (d.N.J. 67-82); Valentine v. Mobil Corp, 789 F.2d 1150 (3rd Cir. 1985).

6. Court determined finding that the courts have not been vested with authority (under PMPA) to review the objective reasonableness or arbitrariness of each franchise agreement. Tiller W. Fred, Jr., et al., v. Amerada Hess Corp., 540 F. Sub 160 . (D.S.C. 11-12-81); Palmieri, Joseph A. v. Mobil Oil Corp., 529 F. Supp. 506 (D.Conn.1-8-82), aff'd, 682 F. 2d 295 (2d Cir. 5-17-82).

7. Court found proposed renewal differed substantially from existing franchise. Eden v. Texaco Refining and Marketing, 664 F. Supp. 1573 (D.Md.1986); Radicki v. Amoco Oil Co., 634 F. Supp. 1393 (D.Minn.1986)

Congress needs to correct these PMPA deficiencies. S.2179 and its companion will do just that — requiring all changes and additions to be fair and reasonable.

Upon review of the above referenced cases (and others) you will find that the courts have come up with a virtual impossible requirement that the retailers prove "bad faith" motives. You will also find that the courts have clearly established that any term and/or confition uniformly applied even if unfair and unreasonable makes no difference under present court interpretation.

The courts have imposed extremely high burdens upon the retailers and the effects of this burden is to deny us the very relief intended by Congress.

With the passage of PMPA we did not know the provisions requiring "good faith" (objective reasonableness) would mean proving "bad faith".

We have only two known examples where "franchisor' company documents have revealed (and confirmed) long-range planning by the oil companies. These documents contain actual evidence of bad faith activities. They are: The BP Northeast Project, May 9, 1973; Atlantic Richfield Company's SPU Meeting, January 26, 1982 Agenda "Confidential Paper". But, even with these documents there is no hope to influence the Courts to alter present directions allowing the oil companies a way around PMPA's intent to stop unfair and unreasonable refusals to renew.

Unless Congress provides for a change in the law to compel the courts to go a different direction, the intended Congressional relief is lost.

The following excerpts from Emory Law Journal's "Conclusions" in a "Judicial Interpretation of The Petroleum Marketing Practices Act: Conflict and Diversity," Volume 32, page 273-318 4/ more authoritatively expresses the need for Congressional Action to clear up the problems with PMPA in the Courts:

> "Although it has thus eliminated totally arbitrary and discriminatory franchise terminations, the PMPA has not discouraged successfully the use of some extremely burdensome clauses in a franchise agreement. Minimum gallonage requirements, for example, have been upheld routinely. Requirements that a franchisee operate his station twenty-four hours per day, seven days per week also have been upheld. Oil companies therefore may require independent dealers to sell enormous volumes of gasoline or stay open long hours in order to precipitate terminiation of the franchise and reinstatement of an oil company employee when the franchisee fails to meet the requirements. Once an oil company owns and operates a service station, it can determine, within the bounds of competition, the retail price of gasoline, a result the PMPA was designed to prevent.
>
> Judicial interpretations of PMPA permitting imposition of minimum gallonage requirements, have allowed the uses of enormous rent hikes by the franchisor, ultimately leading to the nonrenewal of the franchise relationship. Although some rent hikes may be the result of a legitimate business decision, others are undoubtedly a means of inducing termination of the franchise, and the courts have found no satisfactory method to distinguish between the two. Focusing only on the franchisor's intent, the courts often permit terminations or nonrenewals when the rent hikes are part of a national marketing strategy, reasoning that if a termination is based on a national policy, it cannot be arbitrary or discriminatory. While the courts' analysis, which permits across the board rent increases, may pervent arbitrary or discriminatory terminations, it does not detect rent hikes imposed for the purpose of inducing termination. The major oil companies therefore could implement a national policy of rent hikes so unreasonably large as to induce termination of many of the independent retailers; a result that the PMPA was designed to prevent. Thus, by analyzing rent hikes solely in terms of franchisors' intent, and ignoring the reasonableness of the rent increase and the effect upon the franchise, the courts have minimized the effectiveness of the PMPA to prohibit unreasonable franchise termination."

4/ See Attached Exhibit B for a complete copy of the "Conclus~~ions~~".

The Courts have provided franchisors with an open invitation to use uniformly designed and applied unfair and unreasonable renewal conditions to constructively terminate franchise relationships for which Congress intended to provide protection.

It is appropriate to suggest and consistent with a finding cited in Report 99-467 U.S. Senate Committee Report on S.1140 dated September 23, 1986 that:

> "It is important to take steps to assure the continued survival of this type of independent business while also enhancing the competitiveness of these retailers. By doing so, we will preserve opportunities for small businesses to develop and flourish while assuring consumers the benefits of enhanced competition and an improved and broader range of services."

Mr. Chairman we thank you for including our position with the attached documents in the official record.

Thank You.

BACKGROUND INFORMATION

Economics of scale on the delivered wholesale price of a load of gasoline to retailers do not differ at one retail station over another retail station. The only legitimate difference is in the minimal transportation cost for deliveries in the same general market area. Such cost is generally paid by the buyer.

Purchase of bulk gasoline for resale to consumers at most retail outlets is limited to one tankwagon (truck) load capacity. Few are on pipeline or can use rail-car loads or barge capacity delivery. The 20,000 gallon a month retailer and the 200,000 to 300,000 gallon a month retailer must necessarily purchase and accept deliveries one tankwagon load at a time.

Most purchases are on a cash on delivery basis. For some retailers security agreements are executed or funds are deposited with suppliers to provide guaranteed protection for payment to the supplier. For many other dealers cashiers' checks must be purchased to accompany credit card sale tickets for payment when the product is delivered. In fact, payment is assured before the gasoline is delivered to underground tanks.

Unlike a small grocery store or other line of business that can obtain food or merchandise for resale from various suppliers or directly from producers, a gasoline franchisee must secure his gasoline from his franchisor (who in many instances is also his landlord), who is therefore the exclusive supplier of the franchisee's principle sale item.

We want to avoid duplication of earlier submitted data which supported and prompted the original enactment of PMPA. Here we want to dwell upon the failure of the courts and others to follow the intent of Congress to provide relief from unjust terminations and failures to renew.

Contract law has proven inadequate. The Federal Trade Commission and the Justice Department have failed miserably to exercise their discretion to provide relief even though there is (and was) obvious evidence that price control was the basis for refiner actions.

State law has been pre-empted leaving no relief availability except by an act of The Congress. With examination of already allowed takeover of retail stations by some refiners, one can see that competitive forces are compelling other refiners to engage in like actions to control retailers and retailing to protect market shares. This increases the need for balancing equity by passage of PMPA Amendments before the Committee.

A free market is best for CONSUMERS. But, a free market does not exist when major oil companies exert control over price and supply using arbitrary terminations and refusals to renew franchise agreements. The federal standards established by Congress for the purpose of assuring a free market have not been fully realized and can not be fully realized without amending PMPA.

The courts are not "flooded" with PMPA cases ... and neither will they be flooded after Congress corrects for the proper legal application of the law to provide the originally intended relief.

Once Congress makes it clear most suppliers will substantially comply thus avoiding clogging the court calendars with PMPA cases.

At least thirty (30) states have some sort of franchise regulations. Trade-off of protection for gasoline dealers under state laws for a uniform federal law does not lessen the need for minimum standards of dealings in the gasoline industry. Congress now has the responsibility of overseeing court interpretations and for making appropriate adjustments in PMPA to facilitate giving the courts clarification so that the intent of Congress is the end result. We urge prompt enactment of Amendments to PMPA to accomplish that intent!

The courts are there for the purpose of resolving disagreements as to Congressional intent. Gasoline dealers deserve this right of redress as do all other Americans.

EXHIBIT A

NO.

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in the Supreme Court of the United States

OCTOBER TERM 1985

FARM STORES, INC.,
Petitioner

vs.

TEXACO, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 763 F.2d 1335; the order of the court of appeals denying Farm Stores' petition for rehearing (App. B) is unreported; the opinion and order of the district court is reported at 577 F.Supp. 682; the judgment of the court of appeals (App. C) is unreported.

JURISDICTION

Petitioner seeks review of the judgment of the court of appeals rendered on September 13, 1985. The opinion of the court of appeals was entered on June 24, 1985. The Petition for Rehearing was denied on September 13, 1985. This Court has jurisdiction to issue the requested writ under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §2801, *et seq.*, are reproduced at App. D. In relevant part, the PMPA provides that the term "franchise" includes:

> [Any] contract under which a *retailer* or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel . . . . 15 U.S.C. §2801(1)(B)(i). [emphasis added]

The statute defines retailer as "any person who purchases motor fuel for sale to the general public for ultimate consumption." 15 U.S.C. §2801(7).

STATEMENT OF CASE

a. Course of Proceedings and Disposition

The district court made a factual finding that Farm Stores was a "purchaser" of motor fuel from Texaco. It concluded that Farm Stores was therefore a "retailer" under the PMPA, and entitled to its protections. 577 F.Supp. at 693-94. Accordingly, the court entered Final Judgment in favor of Farm Stores and enjoined Texaco from terminating the contractual relationship that existed between it and Farm Stores, unless in accordance with the PMPA.

Texaco appealed. The court of appeals reversed, holding that Farm Stores was not a "purchaser," and thus not a retailer under the PMPA.[1]

b. Statement of Facts

After the enactment of the PMPA, Texaco drafted a new lease and consignment agreement for the retail operations that it leased to retailers. Texaco drafted its new contract with the intent of avoiding the PMPA. Farms Stores was the first in Florida to sign the new contract.

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[1] It cannot escape mention that the court of appeals found it necessary to conduct a plenary review of the finding that Farm Stores is a "purchaser." This was done in the face of precedent that a finding that one is a "seller" is subject to the clearly erroneous rule, Fed.R.Civ.P. 52(a). *Croy v. Campbell*, 624 F.2d 709 (5th Cir. 1980). If it had bound itself by the clearly erroneous rule (as it should have), the court of appeals would have been unable to reverse for the reason that ample evidence supported the finding that Farm Stores was a purchaser.

The new contract employs a "consignment" device, instead of a straightforward purchase and sale. *See* Texaco's brief at 17 ("The relationship between the parties with respect to motor fuel is a consignment"). According to the uncontradicted testimony of expert Jack Houston, this particular consignment arrangement is a "purchase" in accordance with the custom and practice of the oil industry.

Under the contract, Farm Stores leases the entire premises and equipment, including the gasoline pumps and tanks. The contract includes a quiet enjoyment clause. The property includes an undersized convenience store, which without gasoline customers could not support itself.

Farm Stores is required to carry property damage insurance protecting all of the property, including the gasoline inventory and equipment. The property is valued in excess of $800,000. Farm Stores is also liable for any loss, damage or destruction to such property. Finally, Farm Stores has an affirmative duty to protect all property, including the gasoline inventory, from any loss, destruction or theft.

Under the contract, Farm Stores makes all decisions relating to the manner and method by which gasoline will be sold to the public. It determines whether the gasoline will be sold on a prepay or postpay basis or whether it will be sold in a self-service format. It is responsible for "driveaways," and the loss of all money, whether through robbery, negligence or otherwise. Farm Stores—not the customer—must make payment to Texaco for all gasoline that passes through the meters, even if Farm Stores is robbed before payment is made to Texaco.

The reason that Texaco chose Farm Stores to lease the property is revealing.[2] Farm Stores was chosen over Southland Corporation because "Southland would not be sensitive to factors of a free market." Texaco wanted someone who would be sensitive to the factors of the free market relating to the *sale of motor fuel.*[3] Texaco knew that Farm Stores was willing to assume the economic risk that it could sell a sufficient amount of gas in order to support the undersized grocery store.[4]

Finally, the new contract states that Farm Stores is an independent contractor with respect to all acts it performs while on the property.

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[2] The building and property was newly constructed. No one had operated at that location for many years.

[3] Texaco had no right to the proceeds from the sale of groceries or the car wash, and, therefore, it was not concerned about whether the operator would be sensitive to the factors of a free market as those factors related to grocery sales.

[4] Both Texaco and Farm Stores knew that food sales would be entirely dependent on gas sales. Further, both knew that Farm Stores would lose money during the first year of operations. The financial records proved that Farm Stores did, indeed, have a loss after the first year. 577 F.Supp. at 691.

REASONS FOR GRANTING WRIT

THE COURT OF APPEALS' DECISION PERMITTING OIL COMPANIES TO CIRCUMVENT THE PETROLEUM MARKETING PRACTICES ACT THROUGH THE USE OF THE CONSIGNMENT DEVICE IS CONTRARY TO SUPREME COURT PRECEDENT AND THE MANDATE OF CONGRESS, AND PRESENTS A QUESTION OF GREAT NATIONAL IMPORTANCE.

a. Introduction

The PMPA tethers large oil refiners in their dealings with retailers. It injects fairness into their relationships, where before there was little or none. S. Rep. No. 731, 95th Cong., 2d Sess. 17, *reprinted in* 1978 U.S. Code Cong. & Ad. News 873, 875. *See, Brach v. Amoco Oil*, 677 F.2d 1213, 1216 (7th Cir. 1982). The ultimate beneficiary is the motoring public. *Id.* at 877.

The decision below sanctions form over substance. It condones the clever use of words to circumvent an important statute. As will be seen, this case turns on the definition of the word "purchase." Unfortunately, "purchase" is not defined in the statute. The only definition that offers guidance is that for the term "retailer," which means "any person who *purchases* motor fuel for sale to the general public for ultimate consumption." 15 U.S.C. §2801(7) (emphasis added).

Texaco drafted a contract under which, for all intents and purposes, the lessee acts as an ordinary retailer, except for the fact that the word "purchase" does not appear in the contract itself. When one moves through the form to the substance of the arrangement, it is obvious that the lessee/operator under Texaco's contract is a purchaser of motor fuel and is one entitled to the protections of the PMPA.

The Eleventh Circuit's decision emasculates the protections afforded under the PMPA and therefore creates a problem of great importance. Moreover, this decision represents a major crossroads for the PMPA. If oil companies are allowed to avoid the PMPA through the consignment device, an industry-wide shift to this arrangement will occur and the statute will be rendered meaningless. The country will effectively return to the pre-PMPA era when oil companies capitalized on their enormous bargaining power to dominate the retailers.[5]

b. Conflict among Decisions.

"The relationship between the parties with respect to motor fuel is a consignment." Texaco Brief at 17.[6] Thus, the central issue in this case is whether a consignment of motor fuel is in substance a purchase.

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[5] The Court of Appeals' decision is an important one of first impression and if allowed to stand, this precedent will also seriously hinder the effective administration of the PMPA. Such an effect is frequently cited as grounds for review by *writ of certiorari. See Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946); *American Federation of Musicians v. Wittstein*, 379 U.S. 171 (1964).

[6] Texaco's position is consistent with Florida law. *See Edwards v. Baldwin Piano Co.*, 79 Fla. 143, 83 So. 915, 918 (1920) (a consignment is created when something is deposited with another to be sold, disposed of or called for).

This issue was answered by this Court in *Simpson v. Union Oil Company of California*, 377 U.S. 13 (1964), and by the Fifth Circuit in *Guidry v. Continental Oil Company*, 350 F.2d 342 (5th Cir. 1965).

In *Simpson*, this Court held that the "consignment" device was simply a purchase and resale agreement. Most importantly, this Court stated that:

> To allow Union Oil to achieve price fixing in this vast distribution system through this "consignment" device would be to make legality for antitrust purposes turn on clever draftsmanship. We refuse to let a matter so vital to a competitive system rest on such easy manipulation. 377 U.S. at 23.

Essentially the same result was reached in *Guidry*. In that case, the dealer entered into a service station lease and a "supplemental bailment agreement" for the supply of gasoline. In determining that the consignment arrangement was, in reality, a "purchase", the court held that:

> While the purchase is effected when and as the Bailee delivers gasoline to his customers from the gasoline storage tanks, "title passing from Conoco to Bailee at the meters on the pumps," it is a title effectively passed. We find "in the contracts themselves and their operation plain provision for purchases by the so-called agents which necessarily made the contracts . . . contracts of sale rather than of agency." 350 F.2d at 345.

In *Guidry*, the court would not permit the antitrust laws to be circumvented "by the easy expedient of dressing a sale in the vestments of a sham agency agreement." 350 F.2d at 344.

Other cases have reached similar conclusions. In *Thompson v. Kerr-McGee Refining Corporation*, 660 F.2d 1380 (10th Cir. 1981), the court affirmed a jury verdict awarding damages under the PMPA to the plaintiff who had "operated a Kerr-McGee gas station in Oklahoma City since 1968 under a combination station lease and motor fuel consignment agreement". In *Loomis v. Gulf Oil Corporation*, 567 F.Supp. 591 (M.D. Fla. 1983), the court held that the PMPA governed a consignment arrangement:

> Gulf Oil Corporation placed petroleum products in tanks located on the premises leased to Loomis on a consignment basis. Under the agreements, title to the gasoline passed to Loomis when the petroleum products passed through the meters on the pumps, and Loomis became obligated immediately to pay Gulf for all petroleum products so purchased and withdrawn. 567 F.Supp. at 594-95

In *Roberts v. Exxon Corporation*, 427 F.Supp. 389 (W.D.La. 1977), the "consignment" agreement provided that:

> Title to such products shall remain in Humble until sold for Humble's account when title shall pass directly from Humble to the service station customer.

Nonetheless, the court determined that such a "consignment" arrangement was, in substance, a purchase of motor fuel. In *Stewart v. Brown*, 546 S.W.2d 204 (Mo. App. 1977), the contract between the refiner and the dealer provided that "title to the fuel shall be and remain in [the refiner] until removed from the tanks 'through and by means of computing pumps' ". The court held that the substance of the "consignment" arrangement was a purchase:

> By their written agreement, [the dealer] was to buy the fuel from [the refiner] upon its removal from the tanks through the computing pumps and pay for the fuel thus purchased "on demand in cash". Since [the dealer] contemporaneously resold the fuel to service station customers at the same time he was purchasing it from [the refiner], and as the demand for payment was not contemplated until [the refiner] had performed the twice-weekly reading of the computer pumps and therefrom computed [the dealer's] cost of fuel, it is evident that the sale from [the refiner] to [the dealer] was not to be a cash sale in strict legal signification and that [the dealer] was to have a short credit following the sale until proper demand could be made. . . . Therefore, with nothing more, the sale of the fuel from [the refiner] to [the dealer] as it passed through the computing pumps changed whatever their previous relationship may have been to that of creditor and debtor. 546 S.W.2d at 207-8.

Finally, in *Stanton v. Texaco, Inc.*, 289 F.Supp. 884 (D. R.I. 1968), Texaco's pre-PMPA consignment arrangement was at issue. In that case, the dealer made a claim under the Robinson-Patman Act, 15 U.S.C. §13, and Texaco made the same argument as it does in this case. The court said the following:

> The defendant [Texaco] asserts that the plaintiff's Robinson-Patman Act theory is faulty because the plaintiff was not a "purchaser" of Texaco gasoline but was only a consignee. A close reading of the several cases cited by the defendant fails to reveal any specific holding that a consignee retailer cannot be a "purchaser" for purposes of §2(a) of the Robinson-Patman Act. In fact, the case which most nearly reaches such a holding, *Students Book Co. v. Washington Law Book Co.* [citation omitted] does so only after a full trial going directly to the reality of the consignment device and to a comparison in contrast of the consignment and purchase-sale distribution mechanisms. 289 F.Supp. at 891-2.

The Eleventh Circuit distinguished both *Simpson* and *Guidry* on the basis that these were antitrust cases.[7] Under this questionable logic[8], a consignment device is a purchase and sale under the antitrust laws, but for some reason, the same consignment device is *not* a purchase under the PMPA.

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[7] The court of appeals also tried to distinguish *Guidry* on the basis that "Guidry leased the station." 763 F.2d at 1341. The court overlooked that Farm Stores leases its station too. 577 F.Supp. at 692.

[8] It is also questionable that the PMPA is not an antitrust statute.

The use of the consignment device to avoid antitrust liability was decimated in *Simpson*. Now, the oil companies are trying the same gimmick in the context of the PMPA. As before, this Court should refuse to allow the few remaining retailers to avoid an important statute by calling something different than it is.

c. As Part of Remedial Legislation, the word "Purchase"—which is not defined in the PMPA—Should be Liberally Construed

The court of appeals acknowledged that the PMPA is "a complex remedial statute." 763 F.2d at 1339. This Court held in *United States v. Bacto-Unidisk*, 394 U.S. 784 (1969), that a remedial statute should be given a "liberal construction consistent with the Act's overriding purpose." Similarly, in *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119 (1953), this Court held that words of a statute should be interpreted "in light of the statutory purpose." *See also, United States v. E.I. DuPont De Nemours*, 351 U.S. 377, 386 (1956) ("Because the Act is couched in broad terms, it is adaptable to the changing types of commercial production and distribution that have evolved since its passage."); *Brach v. Amoco Oil Company*, 677 F.2d 1213, 1221 (1982). In this instance, the statutory purpose of the PMPA was to include within its scope all forms of marketing arrangements.

Because of their vast number and form, the arrangements were given the all encompassing definition of "franchise".[9]

As remedial legislation, the PMPA must be given a liberal construction consistent with its overriding purpose to protect franchisees. *Brach v. Amoco,* 677 F.2d at 1221. Accordingly, the word "purchase" should be given a broad construction consistent with the legislative intent.[10]

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[9] Texaco's behavior in this case illustrates the three abuses that Congress sought to remedy in enacting the PMPA. *Brach v. Amoco Oil Company,* 677 F.2d 1213, 1216 (1982). If Texaco is permitted to terminate consignment contracts with franchisees at will, the independence of Farm Stores and other small businesses will be seriously undermined in contractual negotiations with industry giants like Texaco. Furthermore, Texaco will have the continued leverage to force retailers into contracts of adhesion similar to the one-year contract with Farm Stores. Finally, Texaco's unbridled power to terminate inevitably will disrupt the reasonable expectations of future parties like Farm Stores. Texaco was fully aware Farm Stores would be losing money during its first years of operation, and the early termination—after Farm Stores built up the business and before it was operating in the black—was nothing short of ruthless. This evil is precisely the type of situation that Congress intended to prevent in enacting the PMPA.

[10] A liberal construction is also necessary to meet changes occurring in petroleum marketing. Since the enactment of the PMPA, the oil industry has moved away from the traditional gasoline and repair service station. Now, Texaco (and the others as well) are only constructing a facility with the gasoline island and miniature convenience store. Texaco has named this facility "the System 2000" because it will serve the motoring public's needs through the year 2000. This trend in building does not remove the need for the continuing protection of the PMPA.

Thus, even if this Court concludes no conflict is present, this Court should nonetheless review the decision below because of the significance it holds. Despite the clear statutory purpose of the PMPA, the court of appeals chose to define "purchase" narrowly and strictly. This is contrary to the foregoing precedents of this Court and it undermines effective enforcement of the statute. Simply put, "purchase" should be read to include consignment.

d. Conclusion

This case presents a matter of great national importance. If the remaining large oil companies are permitted to circumvent the PMPA through the use of clever draftmanship, small retailers will once again be at the mercy of the industry giants. Furthermore, the motoring public will ultimately suffer the greatest damage in the form of higher fuel prices. For the foregoing reasons, Supreme Court review is warranted and this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of October, 1985 to counsel for Texaco, Inc.:

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JUDICIAL INTERPRETATION OF THE PETROLEUM MARKETING PRACTICES ACT: CONFLICT AND DIVERSITY

[redacted]

IV. Conclusion

To a large extent, the PMPA has achieved Congress' goal of eliminating arbitrary and discriminatory gasoline franchise terminations. The courts have strongly enforced the terms of the Act, which prohibit termination based upon unreasonable or immaterial terms of the franchise agreement. The PMPA has effectively neutralized the franchisor's superior bargaining power by forbidding termination based upon inequitable clauses inserted in the franchise contract by the franchisor.

Although it has thus eliminated totally arbitrary and discriminatory franchise terminations, the PMPA has not discouraged successfully the use of some extremely burdensome clauses in a franchise agreement. Minimum gallonage requirements, for example, have been upheld routinely. Requirements that a franchisee operate his station twenty-four hours per day, seven days per week also have been upheld. Oil companies therefore may require independent dealers to sell enormous volumes of gasoline or stay open long hours, in order to precipitate termination of the franchise and reinstatement of an oil company employee when the franchisee fails to meet the requirements. Once an oil company owns and operates a service station, it can determine, within the bounds of

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competition, the retail price of gasoline, a result the PMPA was designed to prevent.

Judicial interpretations of the PMPA permitting imposition of minimum gallonage requirements, have allowed the use of enormous rent hikes by the franchisor, ultimately leading to the nonrenewal of the franchise relationship. Although some rent hikes may be the result of a legitimate business decision, others are undoubtedly a means of inducing termination of the franchise, and the courts have found no satisfactory method to distinguish between the two. Focusing only on the franchisor's intent, the courts often permit terminations or nonrenewals when the rent hikes are part of a national marketing strategy, reasoning that if a termination is based on a national policy, it cannot be arbitrary or discriminatory. While the courts' analysis, which permits across the board rent increases, may prevent arbitrary or discriminatory terminations, it does not detect rent hikes imposed for the purpose of inducing termination. The major oil companies therefore could implement a national policy of rent hikes so unreasonably large as to induce termination of many of the independent retailers; a result that the PMPA was designed to prevent. Thus, by analyzing rent hikes solely in terms of franchisors' intent, and ignoring the reasonableness of the rent increase and the effect upon the franchisee, the courts have minimized the effectiveness of the PMPA to prohibit unreasonable franchise termination.

The PMPA has been successful in one sense: it has realized Congress' goal of establishing uniform guidelines regulating motor fuel franchise termination. Since the PMPA pre-empts state law governing termination and nonrenewal, oil companies no longer are regulated by varying state standards in these areas.[193] Conversely, the PMPA has not yet been effective in establishing uniform guidelines regulating franchise termination in the oil industry. As is frequently true of relatively new federal legislation, the federal courts have developed diverging and at times conflicting interpretations of the Act. Until more appellate courts settle these conflicts among the circuits, the realization of Congress' goal of uniformity

will be delayed.

The lack of uniformity among the circuits reflects the failure of the PMPA and the courts to define clearly the rights and obligations of the parties under the Act. It is unclear, for example, who exactly is a franchisee, and there is disagreement over how long a franchise relationship exists after the franchise agreement is terminated. It is equally unclear whether a third party landlord of the service station property is or should be covered by the Act. On the one hand, it would frustrate the PMPA to allow a franchisor to terminate a franchise by merely agreeing with his landlord to end the lease term. On the other hand, a third party landlord has no contractual relationship with the franchisee, and he should not be forced to continue to lease the property merely because of the adverse effect on the franchisee of terminating the leasehold with the franchisor. In addition, the courts have given various interpretations to the PMPA's standard for issuance of a preliminary injunction. By applying a number of different standards, the courts have unnecessarily added an element of unpredictability to a PMPA action.

By legislating the PMPA, Congress has seen fit to regulate the oil industry and the courts should enforce the Act in accord with congressional intent. Congress concluded that it is beneficial to protect the individual proprietor and small businessman from the economically powerful franchisor by imposing a statutory regulation of franchise termination and nonrenewal. Congress recognized that a franchisee invests time and capital in establishing a business and building goodwill; to allow termination in the absence of substandard performance by the franchisee would unfairly violate the franchisee's legitimate expectations. In light of Congress' clearly interventionist stance in this area of the petroleum industry, the courts should interpret the Act accordingly.

Lorin M. Kleeger

Exhibit 18

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[193] See supra note 4.

BEFORE THE

SUBCOMMITTEE ON ENERGY REGULATION AND CONSERVATION

OF THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

OF THE

UNITED STATES SENATE

STATEMENT OF THE

SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA

REGARDING S.2179

October 4, 1988

Summary of the Statement of the
Society of Independent Gasoline Marketers of America
Submitted to the Subcommittee on Energy Regulation and Conservation of the
Committee on Energy and Natural Resources of the United States Senate
Regarding S.2179

The Society of Independent Gasoline Marketers of America ("SIGMA") opposes the enactment of S.2179. Enactment of S.2179 would result in a significant broadening of the scope of the Petroleum Marketing Practices Act of 1978 ("PMPA") to the detriment of franchisors, economic efficiency, and the consuming public.

Section 2 of S.2179 would expand the PMPA's definition of the term "franchise" to include agreements, such as credit card agreements, equipment financing agreements, and agreements for the supply and sale of tires, batteries, and accessories. Such agreements are ancillary to the type of agreement which is central to the concerns addressed by Congress in the PMPA. Including such agreements within the definition of the term "franchise" would result in a much more pervasive and restrictive regulatory system and a dramatic increase in litigation.

Section 3 of S.2179 would result in a significant restriction of franchisors' ability to implement their independent business judgment regarding the use of their assets in a petroleum marketing distribution system. Moreover, enactment of Section 3 of S.2179 would generate substantial amounts of litigation.

Section 4 of S.2179 would require franchisors to provide franchisees with certain information relating to the holder of an underlying real estate interest in a leased marketing premises in which a franchisor has elected not to exercise its real property interests. Moreover, Section 4 of S.2179 would require a franchisor to continue its relationship with a franchisee who has obtained control of leased marketing premises in which the franchisor has elected not to exercise its real estate rights. While the first requirement of S.2179 is not objectionable, the second requirement would unreasonably restrict a franchisor from realigning its supply system to reflect its judgment that a particular location is no longer compatible with its marketing program.

In summary, enactment of S.2179 would disrupt the carefully constructed balance between: (1) a franchisee's right to be protected from franchisors' abusive use of termination or nonrenewal as a remedy for contractual violations or a franchisee's failure to mold its behavior in accordance with a franchisor's wishes, and (2) a franchisor's legitimate interests in retaining adequate flexibility to adjust to changes in circumstances in market conditions and thereby implement programs which, in its good faith judgment, will most efficiently respond to the demand of the consuming public. A disruption of this balance would be grossly inequitable to franchisors and would threaten consumers with significant increases in costs for motor fuels.

Before the
Subcommittee on Energy Regulation and Conservation
of the
Committee on Energy and Natural Resources
of the
United States Senate

Statement of the
Society of Independent Gasoline Marketers of America

Regarding S.2179

October 4, 1988

The Society of Independent Gasoline Marketers of America ("SIGMA") is a national trade association comprised of approximately 285 independent marketers and chain retailers of motor fuel. SIGMA's members market motor fuel in all 50 of the states and their sales constitute between 15 and 20 percent of the U.S. retail market for motor gasoline.

SIGMA's members built their businesses on their marketing efficiencies. They have been pioneers in developing such pro-competitive marketing concepts as self-service and high volume/low margin retailing. Their ability to minimize the amount of fixed costs which must be recovered in the selling price of each gallon of motor fuel has resulted in their being recognized as among the most efficient and competitive motor fuel marketers in the world.

Over one-half of SIGMA's members market product on a "branded" basis. Thus, many of SIGMA's members are both franchisees and franchisors within the meaning of the Petroleum Marketing Practices Act of 1978 ("PMPA"). As a result of this fact, SIGMA is very concerned about the proposed amendments to the PMPA reflected in S.2179.

SIGMA opposes the enactment of S.2179. The amendments proposed therein not only would radically expand the scope of PMPA, thereby resulting in a much broader and pervasive system of regulation, but also would fundamentally alter the balance between the interests of franchisors and franchisees which was developed by Congress when it enacted the PMPA. This alteration of that balance between sometimes competing interests, would have significant detrimental consequences not only for franchisors, but also for consumers of motor fuels.

At the outset, it is important to understand exactly what problems Congress addressed in the PMPA and how it resolved those problems. A clear understanding of the PMPA's history and purpose will demonstrate just how radical an alteration of the existing statutory scheme the enactment of S.2179 would generate.

In enacting the PMPA, Congress responded to its perception of certain inequities arising out of the unequal bargaining power inherent in a relationship in which a franchisor not only grants a trademark license, but also serves as the lessor of the property on which a retail marketing operation is conducted, as well as serving normally as the sole source of supply for the main product lines of that operation. Recognizing this inherent inequality in bargaining power, Congress, in the PMPA, elected to rebalance the positions of the parties by: (1) limiting a franchisor's ability to use termination as a remedy for contractual violations, and (2) prohibiting a franchisor from failing to fulfill a franchisee's reasonable expectations that its relationship with its franchisor would be a continuing one on the basis of arbitrary or discriminatory grounds. In short, by enacting the PMPA, Congress removed arbitrary or discriminatory terminations or nonrenewals as a means by which a franchisor could compel a franchisee to comply with the franchisor's dictates. However, Congress was very clear that it intended to achieve these objectives without rigidifying the motor fuels market or unnecessarily interfering with the ability of a franchisor to adjust to changing market conditions and consumer preferences.

Thus, the PMPA was designed to be a "little" statute aimed at remedying a very narrowly-identified set of problems without extracting from consumers the benefits of efficient markets. It is only reasonable, therefore, that Congress carefully consider the effects on consumers as well as the legitimate expectations of both franchisors and franchisees when evaluating possible amendments to the PMPA.

S.2179 proposes three specific amendments to the PMPA. Each of these amendments represents a significant departure from the original purpose of the PMPA. Moreover, each of these amendments, if enacted, would impose substantial costs on franchisors and consumers.

Section 2 of S.2179 would reverse the decision of the PMPA's drafters to exclude contracts such as credit card agreements, equipment franchise agreements, tires, batteries, and accessories sales agreements, and other agreements ancillary to the operation of a retail outlet from PMPA's definition of the term "franchise." The decision to exclude such ancillary agreements from the PMPA's definition of franchise was correct when it was made and should not now be reversed.

PMPA's drafters properly recognized that the inclusion of agreements, such as those which S.2179 seeks to include, within the definition of franchise was unnecessary to the achievement of the underlying objectives of the statute. Moreover, the drafters, deeply involved in another pervasive program of regulation under the provisions of the Emergency Petroleum Allocation Act of 1973, were acutely aware of the problems and counterproductive results which such pervasive programs generated. Nevertheless, proponents of S.2179 would ignore the reality that enactment of Section 2 of the bill would generate such a pervasive program. SIGMA urges the members of this Subcommittee to recall the inefficiencies and inequities which result when a federal regulatory program tries to replace market participants' independent business decisions.

Before leaving the topic of Section 2 of S.2179, SIGMA urges the Subcommittee to recognize two very fundamental realities. First, the term "economically necessary to the operation of the franchise" is an open and irresistible invitation to litigation. Apparently, the proponents of the bill would leave the definition of this term to the courts. As a result, no franchisor could alter any of its agreements with a franchisee without potentially running the risk of litigation. The effects of such a situation on consumers and the structure of competition in the retail marketing place is readily demonstrated by an example from recent experience.

In the spring of 1983, the Atlantic Richfield Company ("Arco") implemented a new program in connection with the marketing of motor fuels. Specifically, Arco, after years of sponsoring and promoting a credit card program, eliminated credit sales. This action was undertaken along with an aggressive retail marketing program in Arco's marketing areas. There are those who would say that Arco's "blowing up its credit card" touched off one of the biggest gasoline price wars in the history of retail marketing. Whether or not one subscribes to that characterization, there can be no question but that consumers in Arco's marketing area responded to Arco's program and benefited from it. Had Section 2 of S.2179 been in effect at that time, SIGMA submits that Arco could not have implemented this radical change in its program. The inhibition of such adjustments in marketing strategy was simply never intended and remains totally undesirable.

Section 3 of S.2179 would add a third prong to one of the defenses which the PMPA provides a franchisor against a claim of improper nonrenewal of a franchise relationship. If enacted, Section 3 of S.2179 would add a new criterion to the existing requirements that a change in the terms and conditions of a franchise reflect a decision made in good faith and in the normal course of business by a franchisor and upon which it insists for a legitimate purpose other than preventing the renewal of the franchise relationship. Specifically, to the elements of this defense the proponents of S.2179 would add a requirement that any such change be "fair and reasonable." SIGMA opposes this proposed amendment as being unfair, unworkable, and an effective transfer of the control of a franchisor's assets from it to its franchisees.

Because the term "fair and reasonable" is undefined, it again will have to be given its meaning by the courts. However, there is no guidance provided to the court regarding to whom that change must appear "fair and reasonable." Under this proposed amendment, a franchisor who insists on higher rents for its marketing premises could be precluded from obtaining such revenues, despite the fact that the increased rents are premised upon objective evaluations of the property and a consistent strategy for return on assets. Such an approach to the regulation of a franchise relationship departs significantly from the approach generally taken by both the Federal Government and the states.

Normally franchise protection legislation provides for two fundamental elements: (1) disclosures, and (2) a meaningful opportunity to insure that "the rules" upon which a franchisee made his independent business decision have been applied fairly. These two elements of franchise protection legislation reflect the underlying realities of a franchise relationship. Specifically disclosure requirements insure that an individual making an investment of time or money in a program is apprised of the risks inherent in that investment. In short, such a provision is designed to prevent fraud on a prospective franchisee. The second set of requirements, i.e., the "day in court" provisions, are designed to insure that the benefit of a franchisee's bargain cannot be denied to him without his having an opportunity to seek review of the franchisor's proposed action.

So long as a franchisee was cognizant of the risks inherent in the relationship, it is unfair to a franchisor to impose new requirements on that relationship subsequent to its consummation. PMPA franchisees are not compelled to enter into their relationships with their franchisors. It is a decision made independently and without coercion. Moreover, such individuals are cognizant of the fact that the market for petroleum products is a volatile and an evolving one. Finally, such franchisees are keenly aware that their franchisors have an underlying obligation to themselves and their shareholders to deploy and administer the franchisor's assets in a manner which promotes the economic return to the franchisor.

Congress intended to alleviate the principal potential for abuse that was inherent in the petroleum franchise relationship -- arbitrary and discriminatory nonrenewals of franchise relationships. It was not, and should not have been, intended to second guess a franchisor's good faith independent business decision, made in the normal course of business. The good faith tests currently incorporated into 15 U.S.C. §2802(B)(3)(a) are sufficient to achieve that objective. If a franchisor, in addition to being required to meet these requirements, must now worry about how a court will perceive its independent judgment as being fair and reasonable to a franchisee, then franchisors plainly and simply will be rendered incapable of implementing marketing and asset management programs uniformly throughout their network. The resulting rigidification of the petroleum marketplace would be simply unacceptable from the perspective of rational management and consumer costs.

Section 4 of S.2179 would create two new obligations for franchisors. First, a franchisor would be obligated to provide a franchisee with information relating to the owner or lessor of an underlying lease relating to a marketing premises if the franchisor has elected not to exercise its option to renew its lease or to purchase such premises. The second new obligation would be that, in the event a franchisee were able to negotiate an arrangement with the owner or lessor of the underlying real estate interest, then the franchisor, who already had decided not to extend its interest in that real estate, would be required to continue its franchise relationship with the franchisee.

SIGMA has no objection to Congress' imposing on a franchisor the minimal additional burden of assisting a franchisee in its efforts to obtain a real estate interest in the property on which it has operated. However, SIGMA strongly objects to the second proposed requirement of this section.

There is no reasonable basis for Congress' imposing on a franchisor the obligation to continue a franchise relationship with a franchisee at a location which that franchisor has already determined it no longer wishes to serve. Moreover, there is no need for a franchisee at such a location to be afforded that kind of protection.

If a franchisee has obtained the control of the underlying real estate, it will be in a position to negotiate with any supplier which it wishes. Why will it need to lock an unwilling franchisor into a relationship at a location which that franchisor has already determined it does not wish to serve? There is no inherent inequity in this situation. If the franchisee can obtain control of the real estate, then it should be able to obtain supply from a marketer who wishes to serve its business. It is inequitable to require a franchisor to continue service at such a location.

The gasoline marketing industry is an enormously competitive segment of this economy. The elimination of a pervasive set of federal regulations under the Emergency Petroleum Allocation Act of 1973 has, during this decade, permitted the industry to adjust to consumer preferences and changes in market conditions. The result has been improved efficiency, lower costs, and lower prices for consumers. The ability of the industry to effect these changes while abiding by Congress' directive to abandon arbitrary terminations and discriminatory nonrenewals as a means by which to coerce franchisee behavior, is a clear indication of the success of Congress' efforts to strike a balance between the legitimate interests of franchisees and the legitimate interests of franchisors and consumers. This evolution was clearly contemplated by the PMPA's drafters and has without doubt benefited consumers. Enactment of S.2179 would: (1) conflict sharply with the balanced approach adopted by the drafters of the PMPA in 1977 and 1978, (2) promote inefficiencies in the redeployment and administration of marketing assets, thereby increasing consumers' costs, and (3) generate significant amounts of litigation.

In summary, the principal losers if S.2179 were enacted would be franchisors and consumers. The principal winners would be PMPA lawyers.

SIGMA appreciates this opportunity to express its views. SIGMA will gladly respond to any questions which its statement may have raised.

Team Mobil

October 4, 1988

The Honorable Wendell Ford
Committee on Energy and
National Resources
Washington, D.C. 20510

Dear Senator Ford:

We respectfully request that this submission be made a part of the record for the hearing on S.2179, held on October 4, 1988.

At that hearing, Jack Kane, a Mobil dealer, testified concerning the 24 hour requirement of his service station lease. That lease was signed by Mr. Kane in 1985, after lengthy discussions with Mobil concerning the hours of operation of Mr. Kane's service station, and even though he had already received a notice of non-renewal. In 1985, when the Kane lease was up for renewal, it was determined by Mobil, in the ordinary course of business, that Mr. Kane's station should operate 24 hours per day, 7 days a week, consistent with Mobil's national hours policy.

During the period March 1986 through March 1987, a local ordinance prohibited Mr. Kane from operating 24 hours. When that ordinance was declared unconstitutional in 1987, Mobil advised Mr. Kane that he was obligated to comply with his agreed-upon contract hours. Although he received substantial counseling from Mobil to facilitate his 24-hour operation, Mr. Kane resisted and, in the face of termination, filed suit to challenge the 24-hour requirement. Judge Stanley Brotman of the United States District Court held that Mobil's 24-hour requirement was reasonable and of material significance to Mr. Kane's franchise relationship with Mobil.

Significantly, the court also granted Mr. Kane an injunction under the PMPA permitting him to remain in possession of the station and delaying termination, pending resolution of certain factual issues. Thus, the PMPA in its present form has served Mr. Kane well. The accessability of injunctive relief under the PMPA has often enabled dealers like Mr. Kane to continue to operate service stations until their disputes with their franchisors have been resolved and has precluded arbitrary displacement of dealers.

Mobil has continuously worked with Mr. Kane in a spirit of cooperation. We have made physical improvements at his station and, together with 24-hour operation, Mr. Kane has experienced substantial growth in his business. We firmly believe that the PMPA, as originally enacted, provides necessary and sufficient protection for dealers such as Mr. Kane and that no further amendments are advisable.

If you have any questions about this matter or other aspects of the proposed legislation, please contact Barney Skladany in our Washington, D.C. office at 862-1326.

Sincerely,

RW Owens

Robert W. Owens
District Manager
New Jersey Resale District

TOTAL

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K. R. BUECKLER
EXECUTIVE VICE-PRESIDENT
PETROLEUM PRODUCTS

September 29, 1988

The Honorable Howard M. Metzenbaum
Chairman
Senate Subcommittee on Energy
Regulation and Conservation
212 Hart Senate Office Building
Washington, D.C. 20510

Re: Hearing on S. 2179, Legislation To Amend The Petroleum Marketing Practices Act.

Dear Mr. Chairman:

We are writing to inform you of Total Petroleum, Inc.'s ("Total") opposition to legislation pending before the Subcommittee on Energy Regulation and Conservation, S. 2179, which would disturb the delicate balance between the interests of consumers and franchisors on the one hand, and the rights of jobbers and dealers on the other, that Congress so carefully crafted when it passed the Petroleum, Marketing Practices Act ("PMPA") in 1978.

Total is an independent refiner/marketer with its principal offices in Denver, Colorado. Total operates four refineries in Denver, Colorado, Ardmore, Oklahoma, Arkansas City, Kansas and Alma, Michigan that supply gasoline to the consuming public under the Total, Vickers, Apco and Best trade names through approximately 2,400 retail service stations in 19 states.[1] Approximately 1,900 of these stations are operated by independent jobbers and dealers.

The PMPA has proven to be a successful vehicle for ensuring that the interests and rights of consumers, franchisors, jobbers and dealers are adequately protected. The proponents of S. 2179 have failed to present persuasive evidence that its proposed modifications are necessary or represent wise public policy.

S. 2179 would alter the grounds for non-renewal due to a franchisor and franchisee's failure to agree on changes in the franchise relationship by adding a vague, third-party "fair and reasonable standard" to the existing statutory language. In our view, such an amendment will: (1) stifle innovation in marketing operations which benefit consumers, e.g., the sale of non-gasoline products; (2) discourage franchisors from offering ancillary benefits or programs to consumers; and (3) increase litigation because of the resulting uncertainty in agreements between franchisors and franchisees.

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[1] Texas, New Mexico, Colorado, Oklahoma, Tennessee, Kentucky, Missouri, Kansas, Illinois, Michigan, Wisconsin, Minnesota, Iowa, Nebraska, South Dakota, North Dakota, Arkansas, Indiana and Ohio.

In sum, by eliminating the franchisor's present flexibility under the PMPA to improve marketing operations and make sound business judgments, S. 2179 will negatively impact on consumers, franchisors, jobbers and dealers alike. Consequently, Total urges you and other Members of the Subcommittee to reject this legislation which, however well-intentioned, is both unnecessary and unwise.

Thank you for your willingness to include Total's views in the hearing record on S. 2179.

Sincerely,

KRB/kmc